Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

October Term, 1995

HOUSING AUTHORITY OF THE SAC AND FOX NATION,

Petitioner,

v.

JOANN LEWIS AND JAMES F. LEWIS, HUSBAND AND WIFE,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Oklahoma

PETITION FOR WRIT OF CERTIORARI

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PRELIMINARY MATTER[1]
QUESTIONS PRESENTED

1. Whether the State of Oklahoma has inherent and concurrent civil jurisdiction to apply state law and adjudicate controversies between Indians and the Tribes or Tribal Agencies such as the Housing Authority of the Sac and Fox Nation.

2. Whether the Indian housing projects constructed by the Housing Authority of the Sac and Fox Nation pursuant to the Indian Housing Program established by Congress and administered by the Department of Housing and Urban Development to provide homes for homeless Indians are Indian Country, and, if so, whether the passing of title to the home from the Housing Authority to the Indian participant extinguishes the Indian Country status of the home.

3. Whether sovereign immunity bars this action in the Courts of the State of Oklahoma.

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[1] Marjorie L. Wolf was initially a party to the suit in the State District Court, but dismissed her claim prior to the appeal to the Oklahoma Supreme Court. She is listed in the caption of the decision of the Oklahoma Supreme Court but was not a party to the appeal. The Housing Authority of the Sac and Fox Nation has also been known as "The Sac and Fox Tribe of Oklahoma Housing Authroity", "The Housing Authority of the Sac and Fox Tribe of Indians of Oklahoma", and "The Sac and Fox Indian Housing Authority of Oklahoma." The Housing Authority of the Sac and Fox Nation is a governmental agency of the Sac and Fox Nation, a federally recognized Indian Tribe.

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HOUSING AUTHORITY OF THE
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On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Oklahoma

PETITION FOR WRIT OF CERTIORARI

Petitioner, Housing Authority of the Sac and Fox Nation, respectfully prays that a writ of certiorari issue to review the order and judgment of the Supreme Court of the State of Oklahoma entered in this proceeding on February 9, 1994, rehearing having been denied on June 15, 1995.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Oklahoma is reported at 896 P.2d 503, and is reprinted in

the appendix hereto, page App. 1, infra. The Order of the Supreme Court of the State of Oklahoma on rehearing is not reported and is reprinted in the Appendix at page App. 62.

The orders of the District Court of the Twenty-Third Judicial District sitting within and for Pottawatomie County, State of Oklahoma have not been reported. They are reprinted in the Appendix hereto beginning at page App. 47.

JURISDICTION

The opinion of the Supreme Court of the State of Oklahoma was entered on February 9, 1994. Petitioner's Petition for Rehearing was denied on June 15, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

TREATY AND STATUTORY PROVISIONS

United States Constitution, Article I, Section 8, Clause 3: "Congress shall have Power . . . to regulate Commerce . . . with the Indian Tribes."

18 U.S.C. § 1151, Indian country defined

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the

reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

28 U.S.C. § 1322. Assumption by State of civil jurisdiction

(a) Consent of United States; force and effect of civil laws

The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

(b) Alienation, encumbrance, taxation, use, and probate of property

Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute, or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Force and effect of tribal ordinances or customs

Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

42 U.S.C. § 1437bb. Mutual help homeownership opportunity program

(a) Establishment

The Secretary [of HUD] shall carry out a mutual help homeownership opportunity program for Indian families in accordance with this section. The program shall be designed to meet the homeownership needs of Indian families on Indian reservations and other Indian areas, including Indian families whose incomes exceed the levels established for low-income families.

(b) Financial assistance

(1) In general

The Secretary may, to the extent provided in appropriation Acts, enter into contracts with Indian housing authorities under subchapter I of this chapter to provide financial assistance for the development, acquisition, operation, and improvement of housing projects under this section.

STATEMENT OF THE CASE

1. *Nature of the Controversy.*

In this case, two Indian participants in the Mutual Help Homeownership Opportunity Program of the Housing Authority of the Sac and Fox Nation are attempting to use the Courts of the State of Oklahoma to require the Housing Authority to convey to the participants the interests in the oil and gas and other minerals lying beneath their home in the face of tribal legislation which severs that mineral interest and requires that the income from such minerals be used for the benefit of the Housing Authority's housing programs, and to require the Housing Authority to account to the participants for oil and gas produced from the property from the date the participants acquired ownership of the home.

The Sac and Fox Nation is a federally recognized Indian tribe located within the State of Oklahoma, which is organized pursuant to the Oklahoma Indian Welfare Act, 25 U.S.C. § 501 et seq. and the Indian Reorganization Act, 25 U.S.C. § 476 et seq. The reservation of the Sac and

Fox Nation lies in central Oklahoma and has been repeatedly recognized by Congress as a reservation for various purposes. *See, e.g.* 12 U.S.C.A. § 4702, (Community Development Banking and Financial Institutions); 16 U.S.C.A. § 1722 (Public Lands Corps); 25 U.S.C.A. § 1452 (Financing Economic Development of Indians and Indian Organizations); 25 U.S.C.A. § 2024 (Tribal Departments of Education); 25 U.S.C.A. § 3103 (National Indian Forest Resources Management); 25 U.S.C.A. § 3202 (Indian Child Protection and Family Violence Prevention); 25 U.S.C.A. § 3501 (Indian Energy Resources); 29 U.S.C.A. § 750 (Indian Vocational Rehabilitation Services); 33 U.S.C.A. § 1377 (Water Pollution Prevention And Control); 42 U.S.C.A. § 682 (Job Opportunities and Basic Skills Training Program); 42 U.S.C.A. § 5318 (Urban development action grants); *Oklahoma Tax Commission v. Sac and Fox Nation*, ___ U.S. ___, 113 S.Ct. 1985 (1993).

The Sac and Fox Nation established the Sac and Fox Housing Authority in 1966 to provide low-income housing for its citizens and other Indians in order to take advantage of the Indian Housing programs which had been instituted by the United States Department of Housing and Urban Development (HUD) in 1962. The 1966 resolution and the federal Housing Act of 1937 were silent as to any express waiver of sovereign immunity and designation of a forum in which the Housing Authority could be sued. In 1974, the Housing Authority entered in a certain "Mutual Help and Occupancy Agreement" (MHO) and "Lease" with the Lewis' which are the subject of this action. The MHO provides variously that the Authority will, once all borrowed money attributable to the house has been paid back through HUD, "convey to

the Participant all of its interest in his house and grounds" and "convey to the Participant the maximum interest in the Participant's house and grounds that it can give." The property upon which the participants house was to be built pursuant to the Housing Program was acquired in fee simple by the Housing Authority. This acquisition included certain mineral rights to the land. The participant's home was constructed as a part of a "cluster" development which included the participant's home and several other homes constructed for the purpose of providing homes to homeless Indians pursuant to the federal Indian Housing Program.

The Sac and Fox Nation reorganized the Housing Authority in the Sac and Fox Housing Authority Act of 1983, SF Public Law SF-83-25, renaming it as the Housing Authority of the Sac and Fox Nation. All the members of the Board of Commissioners of the Housing Authority continue to be appointed by the Sac and Fox Nation. This Act provides for a limited waiver of Housing Authority sovereign immunity and specifically designates the Courts of the Sac and Fox Nation as the forum in which the Housing Authority may be sued. This Act further severs the minerals underlying the projects of the Authority and provides that they cannot be conveyed by deed absent the express permission of the tribal legislature. The constitution of the Sac and Fox Nation does not require the approval of any federal official prior to its legislation becoming effective, and the federal Indian Housing legislation does not require such approval. *See, Kerr-McGee v. Navajo Tribe*, 471 U.S. 195 (1985). However, the HUD regulations require approval of tribal housing

ordinances notwithstanding this Court's ruling in *Kerr-McGee.*

The District Court found that the Sac and Fox Nation provides exclusive police protection, social services, and food services to the inhabitants of this Housing Project, and that law enforcement officers of the City of Shawnee and Pottawatomie County treat this housing project as Indian Country regardless of whether the Housing Authority holds title to the land. The Court further found that the Indian Health Service provides health care to the inhabitants of the project, and that the Housing Authority makes its payments in lieu of taxes pursuant to the federal regulations providing for such payment to the government having jurisdiction over the project to the Sac and Fox Nation. The Court also found that the State of Oklahoma does not appoint board members to the Housing Authority Board of Commissions, does not provide services to the inhabitants of this housing project, and does not appropriate funds for the Housing Authority of the Sac and Fox Nation. After the enactment of the Sac and Fox Housing Authority Act of 1983, but prior to HUD approval thereof, the Housing Authority of the Sac and Fox Nation conveyed all of its surface interests in the house and land to the Lewis'. Subsequent to the trial of this action, HUD finally approved the Sac and Fox Housing Authority Act of 1983.

2. *The Proceedings Below.*

The Lewis' Petition was filed in the District Court on December 7, 1990. The Housing Authority filed its motion

to dismiss on January 2, 1991 asserting that the "defendant is a governmental agency of the Sac and Fox Nation and is thereby cloaked with sovereign immunity barring plaintiffs' claims and thereby leaving the court without subject matter or personal jurisdiction" and on the grounds that "Jurisdiction over plaintiffs' claims are tribal in nature, and state court [sic] does not have jurisdiction to entertain the matter." On the 21st day of February, 1991, an evidentiary hearing was held and argument had upon the Motion to Dismiss. The motion to dismiss was subsequently overruled and denied by order dated May 3, 1991. See Appendix Page 47.

The objections to the trial court's jurisdiction were again raised at trial on October 29, 1991, and by Journal Entry dated November 4, 1991 those objections were overruled. Appendix Page 54. The jurisdictional issues were raised in the Housing Authority's Petition in Error filed on Appeal to the Supreme Court of the State of Oklahoma, and were determined adversely to the Housing Authority by that Court. Appendix Page 1. Rehearing was denied on June 15, 1995.

REASONS FOR GRANTING THE WRIT

The Oklahoma courts' reasoning is identical to that previously disavowed by this Court:

> [I]n a case over which the state would have jurisdiction except for the fact that it occurred within the boundaries of [Indian Country], it would have such jurisdiction after admission of the State to the Union except to the extent that

> sole and exclusive power over the [Indian Country] in the federal government is expressly reserved. *Williams v. Lee*, 83 Ariz. 241, 244, 319 P.2d 998, 1000 (1958). Reversed. *Williams v. Lee*, 358 U.S. 217 (1959).
>
> Only that litigation which is explicitly withdrawn by Congress or that which infringes upon tribal self-government stands outside the boundaries of permissible state-court cognizance. *Lewis v. Sac and Fox Housing Authority*, 896 P.2d 503 (Okla. 1994) reh. den. June 15, 1995.
>
> Justice STEVENS appears to embrace the opposite presumption – that state laws apply on Indian reservations absent an express congressional statement to the contrary. But, as we stated in White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 151, 100 S.Ct. 2578, 2587, 65 L.Ed.2d 665 (1980), in the context of an assertion of state authority over the activities of non-Indians within a reservation, "[t]hat is simply not the law." It is even less correct when applied to the activities of tribes and tribal members within reservations. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 fn 18 (1987).

The Supreme Court of the State of Oklahoma has rendered a decision which is in conflict with applicable decisions of this Court by asserting that the Oklahoma state courts have inherent and concurrent jurisdiction to hear and determine contract actions between Indians and tribal governmental agencies concerning title to land held by the tribal agency unless they are ousted of their concurrent jurisdiction by a specific act of Congress. The Oklahoma Supreme Court ignored the plain meaning of the applicable decisions of this Court, such as *Williams v. Lee*, 358 U.S. 217 (1959), *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), and *White Mountain*

Apache Tribe v. Bracker, 448 U.S. 136 (1980); and *Kennerly v. District Court* 400 U.S. 423 (1971), and the United States Court of Appeals for the Tenth Circuit, *Seneca-Cayuga Tribe v. State ex rel. Thompson,* 874 F.2d 709 (10th Cir. 1989) which clearly hold that State Courts have no "residuary" or "inherent" or "concurrent" jurisdiction over matters affecting Indians in the Indian Country, and may exercise jurisdiction over matters concerning Indians in the Indian Country only with Congressional permission. *Worcester v. Georgia,* 31 U.S. 515 (1832).

I. THE OKLAHOMA SUPREME COURT'S OPINION CLAIMING INHERENT AND CONCURRENT JURISDICTION OVER DISPUTES BETWEEN INDIANS AND INDIAN HOUSING AUTHORITIES IN THE ABSENCE OF SPECIFIC FEDERAL LEGISLATION PROHIBITING SUCH JURISDICTION, AND APPLYING STATE LAW THERETO, IS IN CONFLICT WITH THE DECISIONS OF THIS COURT AND THE FEDERAL APPELLATE COURTS.

The Supreme Court of the State of Oklahoma recast the issues presented in this case to ask: "Has Congress affirmatively ousted state courts of their concurrent jurisdiction to entertain contract actions involving land transactions between Indian buyers and *state-created housing authorities*?" (emphasis in the original) thereby ignoring the factual findings of the state District Court which determined that the Housing Authority of the Sac and Fox Nation was in fact created by Sac and Fox resolution SF-66-4 dated November 20, 1965, see findings 6 & 8, Order dated May 3, 1991, Appendix at Page 49, and turning the proper analysis of the issues on its head. The Oklahoma Supreme Court went on to determine that state

courts could adjudicate controversies between Indians and Indian Housing Authorities so long as Congress had not affirmatively ousted the state of its "concurrent" jurisdiction referring to this Court's decisions in *Yellow Freight System, Inc. v. Donnelly,* 494 U.S. 820 (1990) and *Gulf Offshore v. Mobil Oil,* 453 U.S. 473 (1981), two cases which did not involve Indian law questions. As this Court so eloquently stated in *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136 (1980), "[t]hat is simply not the law."

The Oklahoma Supreme Court announced the test it was to apply in the following terms:

> In sum, whenever Indian interests are tendered in a controversy, a state court must make a preliminary inquiry into the nature of the rights sought to be settled. Only that litigation which is explicitly withdrawn by Congress or that which infringes upon tribal self-government stands outside the boundaries of permissible state-court cognizance.

Lewis v. Sac and Fox Housing Authority, 896 P.2d 503 (Okla. 1994) reh. den. June 15, 1995. This statement of the applicable law is irreconcilable with the decisions of this Court which state repeatedly that states have authority over matters concerning Indians within Indian Country only via Congressional consent. If the Oklahoma Court's statement of the law is correct, the Congressional adoption of P.L. 83-280, and its amendments requiring tribal consent to state court adjudicatory authority over the Tribe's Indian Country, 25 U.S.C. §§1322, 1326, is a vain and useless act.

The position of the Oklahoma Supreme Court is also inconsistent with those decisions of this Court and the United States Court of Appeals for the Tenth Circuit which require abstention in favor of tribal court determinations of tribal court jurisdiction – including issues regarding territorial or "Indian Country" jurisdiction. *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985); *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987); *Bank of Oklahoma v. Muscogee (Creek) Nation*, 972 F.2d 1166 (10th Cir. 1992). Here the District Court took judicial notice of the applicable laws of the Sac and Fox Nation, yet the Supreme Court of Oklahoma simply refused to consider them and applied Oklahoma law instead of analyzing the tribal law and federal regulations to determine the rights of the participants in the MHO Agreement. Simply stated, the Oklahoma Court is claiming more authority over Indians than do the federal courts. State courts, like federal courts, should be required to abstain in such cases to allow the tribal courts to initially consider these jurisdictional issues, with such determinations subject to review in the federal courts. *National Farmers*, supra.

Finally, it is inconceivable that the order of the Supreme Court of Oklahoma requiring that a tribal agency be divested of an interest in real property claimed by the Tribe itself pursuant to its laws, and determining the relationship between the Tribal Housing Authority and the participants in its Indian programs funded by the federal government does not interfere with tribal self-government. The intrusion here is much more substantial and direct than that struck down by this Court in *Williams v. Lee*, supra and *McClanahan v. Arizona Tax Commission*,

411 U.S. 164 (1973) as the decision goes to the heart of the Indian housing program and purports to determine the rights of the participants vis-a-vis the Tribal Housing Authority. This opinion of the Oklahoma Supreme Court cannot be reconciled with the Indian law jurisprudence of this Court, and should be corrected.

II. THE OKLAHOMA SUPREME COURT'S OPINION DETERMINING THAT THE HOME AT ISSUE WAS NOT INDIAN COUNTRY BY VIRTUE OF ITS ACQUISITION FROM FEE SIMPLE OWNERSHIP BY THE HOUSING AUTHORITY AND THE DEED TO THE PARTICIPANT IN CONTROVERSY IN THIS CASE IS IN CONFLICT WITH THE DECISIONS OF THIS COURT AND ADDRESSES AN IMPORTANT ISSUE OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The primary considerations in determining whether a particular area is a Dependent Indian Community may be enunciated as follows:

(1) "the nature of the area in question, the relationship of the inhabitants of the area to Indian tribes and to the federal government, and the established practice of government agencies toward the area,"

(2) "whether such lands have been set apart for the use, occupancy and protection of dependent Indian peoples,"

The state Courts ruled in this case that the land upon which the Lewis' home was built by the Housing Authority of the Sac and Fox Nation was not Indian Country at

the time the raw land was initially acquired by the Housing Authority. Although neither the District Court nor the Oklahoma Supreme Court specifically ruled on the issue, the record is abundantly clear that the housing area in which the Lewis' home was built met the tests announced by the federal courts to qualify as a Dependent Indian Community pursuant to 18 U.S.C. §1151(b) after its acquisition by the Housing Authority for the purpose of constructing homes for homeless Indians. *United States v. McGowan*, 302 U.S. 535, 539 (1938); *U.S. v. State of S.D.*, (8th Cir. 1981), 665 F.2d 837, certiorari denied 459 U.S. 823; *United States v. Martine*, 442 F.2d 1022, 1023 (10th Cir. 1971).

However, the Court went on to state that the same deed which is at issue here (the conveyance to the Lewis') operated to terminate the Indian Country status of the Lewis' home and therefore vested jurisdiction in the State Courts to adjudicate whether that deed was sufficient under the Indian Housing Program conducted by the Housing Authority of the Sac and Fox Nation. In so doing, the Oklahoma Supreme Court has inserted a title requirement into the determination of whether a particular area is a Dependent Indian Community, and has determined that a simple change in ownership of the property from the Housing Authority to the Indian who was the participant in the Housing Program for whom the home was built destroyed the Indian Country character of the land. There is simply no authority for this decision. A reading of Section 1151 of Title 18 of the United States Code indicated that Congress has determined that title to property affects Indian Country only when 1151(c) – Indian allotments – are implicated. Title to the property is

not a statutory requirement for a determination that a particular tract of land is within either a reservation or a Dependent Indian Community.

Further, research has revealed no federal Court authority determining how a Dependent Indian Community is extinguished after it is established. The general rule for reservation areas is that all tracts within the reservation remain with the Indian Country until the boundaries thereof are extinguished or modified by Congress. This should be the rule with respect to Dependent Indian Communities. Until Congress determines that Indian Housing Authority projects should be extinguished as Indian Communities, they should retain their character as Indian Country. Given the number of federally recognized tribes having significant housing authority programs, this is an important issue which needs to be resolved by this Court, because the issue of the Indian Country status of such projects will repeatedly arise as the early Indian Housing projects are paid off and the properties conveyed to the participants. It is critical that the federal, tribal, and state governments have the guidance of this Court with respect to the continued provision of police, fire, and other governmental services to such areas to avoid a flood of federal civil rights and other litigation based upon a claim of erroneous application of governmental authority.

III. THE FAILURE OF THE OKLAHOMA SUPREME COURT TO DISMISS ON SOVEREIGN IMMUNITY GROUNDS IS IN CONFLICT WITH THE DECISIONS OF THIS COURT AND THE FEDERAL APPELLATE COURTS.

Counsel for Petitioners' are aware that previous counsel for the Housing Authority did not pursue the issue of sovereign immunity in the Oklahoma Supreme Court. However, neither the Housing Authority nor counsel are empowered under tribal law to waive such immunity as has been granted or preserved by the Sac and Fox Nation pursuant to the Nation's legislative power. Therefore, Petitioner reasserts that sovereign immunity, as articulated by this Court, required dismissal of the state court action.

A basic tenet of Indian law is that Indian tribes possess common law immunity from suit traditionally attributed to sovereign and quasi-sovereign entities. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, (1978); *Puyallup Tribe, Inc. v. Washington Department of Game*, 433 U.S. 165, 172-173, (1977); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512, (1940).

Indian tribes in Oklahoma, including the Sac and Fox Nation and its agencies, are immune from suit absent express authorization from Congress or the tribal government. *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940), quoted in *Santa Clara Pueblo v. Martinez, supra.* This Court has repeatedly confirmed the sovereign immunity of Indian tribes, bands, and nations.

The defense of sovereign immunity goes to the subject matter jurisdiction of the Court since a sovereign is

immune from suit except as it consents to be sued, and the terms of its consent to be sued in any court define that Court's jurisdiction to entertain the suit. *United States v. Mitchell*, 445 U.S. 535, 538 (1980). Immunity from suit is an attribute of sovereignty which may not be bartered away, and a sovereign, even when it binds itself by contract is under no obligation to provide a remedy through any court. The withdrawal of all remedies is permissible and has been sustained even though the sovereign had waived its immunity by contract. *Lynch v. United States*, 292 U.S. 571, 581-582 (1934).

This Court has reaffirmed the sovereign immunity of the Indian tribes in Oklahoma:

> A doctrine of Indian tribal sovereign immunity was originally enunciated by this Court, and has been reaffirmed in a number of cases. (citations omitted) Congress has always been at liberty to dispense with such tribal immunity or to limit it . . . Congress has consistently reiterated its approval of the immunity doctrine. See, e.g., Indian Financing Act of 1974, 88 Stat. 77, 25 U.S.C. §1451 et seq., and the Indian Self-Determination and Education Assistance Act, 88 Stat. 2203, 25 U.S.C. §450 et seq. These Acts reflect Congress' desire to promote the "goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987). Under these circumstances, we are not disposed to modify the long established principle of tribal sovereign immunity.

Oklahoma Tax Commission v. Potawatomi Indian Tribe, 111 S.Ct. 905, 910 (1991).

As sovereign immunity goes to the core of a court's subject matter jurisdiction, sovereign immunity required the Oklahoma Supreme Court to inquire as to whether it had subject matter jurisdiction. "Want of consent is a fundamental defect that may be asserted at any time, and is not subject to estoppel." **Law of Federal Courts,** p. 115, Charles Wright (West Pub. Co., 1983). Since the Sac and Fox Nation did not waive the Authority's immunity in state court, the matter should have been dismissed.

CONCLUSION

For the foregoing reasons the Petitioner respectfully requests that this Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

JOANN LEWIS and JAMES F. LEWIS, Husband and Wife, Plaintiffs-Appellees, MARJORIE L. WOLF, Plaintiff, v. THE SAC AND FOX TRIBE OF OKLAHOMA HOUSING AUTHORITY, a/k/a THE HOUSING AUTHORITY OF THE SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA, a/k/a HOUSING AUTHORITY OF THE SAC & FOX NATION, a/k/a SAC AND FOX INDIAN HOUSING AUTHORITY OF OKLAHOMA, Defendant-Appellant.	)	FOR OFFICIAL PUBLICATION No. 78,825 (Filed Feb. 8, 1994)

ON APPEAL FROM THE DISTRICT COURT, POTTAWATOMIE COUNTY

Glenn Dale Carter, Judge

In an action (a) for specific performance of the Sac and Fox Housing Authority's agreement with the Indian buyers (plaintiffs) to convey to them a fee simple estate and (b) for an accounting of oil and gas revenues, the trial court ruled that the state court had jurisdiction of the dispute and ordered the housing authority to convey the reserved mineral estate and to account for the proportionate share of the mineral revenues attributable to the contested property.

THE TRIAL COURT'S JUDGMENT IS AFFIRMED

L. Susan Work
Seminole, Oklahoma — For Appellant

Douglas L. Combs
Shawnee, Oklahoma — For Appellees

OPALA, J.

The two issues presented by this appeal are: [1] Has Congress affirmatively ousted state courts of their concurrent jurisdiction to entertain contract actions involving land transactions between Indian buyers and *state-created Indian housing authorities?* and if not [2] Do the terms of the Mutual Help and Occupancy Agreement between the Indian plaintiffs and the state-created Indian housing authority express an intent to convey both the surface and mineral estates to the plaintiffs? We answer the *first* question in the *negative* and the *second* in the *affirmative.*

I

THE ANATOMY OF LITIGATION

The Sac and Fox Nation [Tribe] is a federally recognized sovereign Indian tribe. In 1789 the Tribe entered into its first treaty with the United States and ceded much of its land.[1] A treaty-imposed migration followed over a number of years, as a result of which the Tribe eventually settled in 1867 at its final destination on the Sac and Fox

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[1] Treaty at Fort Harmar, 7 Stat. 28; Oklahoma Tax Com'n v. Sac and Fox Nation, 508 U.S. ___, 113 S.Ct. 1985, 124 L.Ed.2d 30 (1993).

Reservation in Indian Territory.[2] In response to white settlers' demands for land, Congress entered into a treaty designed to implement the provisions of the Dawes Act.[3] This treaty allowed the Tribe to retain 800 acres. Within the boundaries of that land, each tribal member had the right to choose an allotment of one-quarter section. Congress ratified the treaty in 1891.[4]

The United States Housing Act of 1937 [1937 Act] ushered in the Low Rent Public Housing Program to assist states in remedying unsafe and unsanitary housing conditions plaguing low-income strata.[5] The 1937 Act, which also provided a statutory basis for furnishing low-cost housing to Indians,[6] was not implemented by the United States Department of Housing and Urban Development [HUD] until 1962. It was then that HUD made the program specifically available for Indian Country[7] and promulgated regulations directly affecting the creation and administration of Indian housing authorities [IHA].[8]

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[2] M. Wright, *A Guide to the Indian Tribes of Oklahoma*, 225-6 (1951).

[3] The Dawes Act, also called the General Allotment Act, 24 Stat. 388, provided for allotting reservation land to individual tribal members and purchasing the surplus for white settlers.

[4] 26 Stat. 750-751.

[5] 42 U.S.C. § 1437 (1988).

[6] Staff of Senate Comm. on Interior and Insular Affairs, 94th Cong., 1st sess., Report on the Indian Housing Effort in the United States with Selected Appendices 3 (Comm. Print 1975).

[7] *Id.; see also* Mark K. Ulmer, *The Legal Origin and Nature of Indian Housing Authorities and the HUD Indian Housing Programs*, 13 Am. Indian L. Rev. 109, 110 (1988).

[8] 24 C.F.R. §§ 905.101-905.950 (1990).

These regulations give the Indian tribes the opportunity to *establish an IHA through the framework of either tribal or state law.*[9] *Our Legislature enacted the Oklahoma Housing Authorities Act*[10] *which authorizes the creation of local IHAs and makes them state agencies.*[11]

In conformity with the Oklahoma Act the Housing Authority of the Sac and Fox Tribe of Oklahoma [Authority] was created in 1966.[12] It provides low-income housing for tribal members and for other Indians with the use of HUD funds. *In 1983 the Authority was reorganized under tribal law.*[13] Because the Tribe's IHA had not received HUD approval for operating under the tribal law of 1983 – a step needed to receive federal funding – *the Authority continued its existence as a state agency under the Oklahoma Act. It acquired fee simple title to the property here in contest in 1974 by warranty deed from non-Indian owners.* The deed

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[9] 24 C.F.R. §§ 905.125-26 (1991).

[10] 63 O.S.1981 §§ 1051 et seq.

[11] The pertinent terms of 63 O.S.1981 § 1057 provide that IHAs established under the Oklahoma Housing Authorities Act "*shall be an agency of the State* of Oklahoma, possessing all powers, rights, and functions herein specified for city and county authorities created pursuant to this act * * *." (Emphasis added.)

[12] By tribal resolution (SF-66-4) of November 20, 1965, the Sac and Fox Tribe of Oklahoma authorized the Authority to conduct business and exercise powers pursuant to the Oklahoma Housing Authorities Act, *supra* note 10.

[13] Sac and Fox Housing Authority Act of 1983, Resolution SF-83-25. Section 902 of this act allows the Authority to waive its sovereign immunity and designates the tribal court as the forum in which the hosing authority is to be sued. *At the time of trial HUD had not given a final agency approval for the 1983 Act.*

imposes no restriction on ownership. *The property, which is located in the city limits of Shawnee, Oklahoma, had originally been a Kickapoo Indian allotment.*[14] The site was designated as housing Project 90-05.

The appellees, Joann and James F. Lewis [collectively called Lewis], *who are tribal members,* entered on December 22, 1974 into a Mutual Help and Occupancy Agreement [MHO Agreement] with the Authority. Pursuant to this contract Lewis' home was constructed on the project site. They were advised this home would be paid off on September 1, 1990 and title would then pass to them. By warranty deed the Authority did convey to Lewis *surface rights only, reserving unto itself the oil and gas and other mineral rights underlying the property.*

In this suit Lewis sought *specific performance* of the MHO contract and an accounting for all oil and gas revenues the Authority received since the date of the conveyance. The Authority *objected* both to the district court's *in rem* and *in personam* jurisdiction. Its challenge to state-court jurisdiction rested on a two-prong attack: (a) the sovereign-immunity status of the housing authority[15] and (b) the project's claim as a "dependent Indian

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[14] The property was later sold to a non-Indian owner. *The Authority acquired fee simple title from the land's non-Indian owner, who held it without any restrictions on Indian ownership.*

[15] On appeal the Authority abandoned its sovereign immunity challenge, see *infra* note 59.

community" within the definition of "Indian Country".[16] The trial court denied the Authority's quest for the action's dismissal (for want of subject matter jurisdiction), ruling that, at the time of the parties' contract, the land in question was not within "Indian Country". After a bench trial the nisi prius court gave judgment to Lewis, directing the Authority to convey to them its title to the mineral interest in contest.[17] The Authority brings this appeal.

II

OUTSIDE THE FRAMEWORK OF PUBLIC LAW 83-280 THERE IS A "WINDOW OF OPPORTUNITY" FOR STATES TO ADJUDICATE MIXED QUESTIONS OF STATE/FEDERAL/TRIBAL LAW, WHEN THE EXERCISE OF THEIR JURISDICTION DOES NOT INFRINGE UPON TRIBAL SELF-GOVERNMENT

In 1953, Congress promulgated Public Law 83-280 [hereinafter PL-280] to provide a method for the states to

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[16] "Indian Country" includes "dependent Indian communities" defined in 18 U.S.C. § 1151 as follows:

> " . . . (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state. . . . "

[17] The scheduling order below indicates the cause was to be reached for "trial by jury." According to the pre-trial conference order the parties had agreed to "waive the jury." Since both claims – that for specific performances as well as that for accounting – are of equitable cognizance, the "waiver" does not appear to have been necessary. McCraw v. Richardson., Okl., 459 P.2d 620, 623 (1969) (specific performance); Fleet v. Sanguine, Ltd., Okl., 854 P.2d 892, 896 n. 17 (1993) (equitable accounting).

assume criminal and/or civil jurisdiction over "Indian Country".[18] As originally proposed, PL-280 allowed states to assume cognizance without the consent of an affected tribe.[19] As part of the Civil Rights Act of 1968.[20] Congress amended PL-280 to require that the state take some affirmative action when opting to extend its jurisdiction to Indian Country.[21] A state may assert cognizance over Indian Country *only* if the enrolled Indians have given their consent by tribal referendum.[22]

The U.S. Supreme Court has continued to emphasize the congressional policy of fostering tribal autonomy as a

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[18] "Indian Country" refers to a broad definition found in 18 U.S.C. § 1151, *supra* note 16, which includes "formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States." *Sac and Fox Nation, supra* note 1. Although § 1151 defines Indian Country for application to the exercise of federal criminal jurisdiction, its terms extend to civil jurisdiction as well. Indian Country, U.S.A. v. Oklahoma Tax Com'n, 829 F.2d 967, 973 (10th Cir. 1987) (*citing* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207, 107 S.Ct. 1083, 1087 n. 5, 94 L.Ed.2d 244 (1987)).

[19] State ex rel. May v. Seneca-Cayuga Tribe, Okl., 711 P.2d 77, 86 (1985).

[20] 25 U.S.C. §§ 1321 et seq.

[21] Because Oklahoma did not take the appropriate steps to take jurisdiction under PL-280, the proper inquiry to be made in this case must focus upon the congressional policy of fostering tribal autonomy in the light of pertinent U.S. Supreme Court jurisprudence. Ahboah v. Housing Authority of Kiowa Tribes, Okl., 660 P.2d 625, 629 n. 19 (1983).

[22] "Indian Civil Rights Act of 1968", Act of April 11, 1968, PL 90-284, 82 Stat. 77 (codified as amended at 25 U.S.C. §§ 1301, 1302, and 1303 (1982)).

guiding light in allocating jurisdiction to courts in states that have not complied with PL-280.[23] In *Kennerly v. District Court*,[24] the Court withheld from Montana concurrent state jurisdiction over Indian Country. There, two members of the Blackfeet Tribe were sued in state court on a debt for food bought from a grocery store located on private land *within the exterior boundaries of the reservation.* The Court concluded that Montana had not complied with the terms of PL-280, because the state never took affirmative legislative action to assume *civil jurisdiction over the Blackfeet Reservation.*[25]

Kennerly, which relies upon the teachings of *Williams v. Lee*[26] that "absent governing Acts of Congress, the question has always been whether the state action infringed upon the right of the reservation Indians to make their own laws and be ruled by them,"[27] does not stand as authority defeating concurrent state jurisdiction *in all civil cases.* Its thrust "is concerned solely with the

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[23] South Dakota v. Bourland, 508 U.S. ___, 113 S.Ct. 2309, 2319, 124 L.Ed.2d 606 (1993); Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico, 458 U.S. 832, 838, 102 S.Ct. 3394, 3398, 73 L.Ed.2d 1174 (1982); Montana v. United States, 450 U.S. 544, 564, 101 S.Ct. 1245, 1258, 67 L.Ed.2d 493 (1981); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142-145, 100 S.Ct. 2578, 2583-2584, 65 L.Ed.2d 665 (1980).

[24] Kennerly v. District Court, 400 U.S. 423, 91 S.Ct. 480, 27 L.Ed.2d 507 (1971) (*per curiam*).

[25] *Kennerly, supra* note 24, 400 U.S. at 425, 91 S.Ct. at 482.

[26] Williams v. Lee, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959).

[27] *Williams, supra* note 26, 358 U.S. at 220, 79 S.Ct. at 271.

procedural mechanisms by which tribal consent must be registered."[28]

Another case from Montana, *Fisher v. District Court*,[29] stressed the overriding congressional policy of fostering tribal self-government.[30] There, while concurrent state cognizance was found inappropriate, the Court reiterated that the paramount test calls for a preliminary inquiry into whether assumption of jurisdiction would infringe upon tribal self-government. The Court reasoned that tribal courts provide the appropriate forum for settlement of those disputes over personal and property interests of Indians which *arise out of tribal relationships*.[31] The teachings of *Kennerly* and *Fisher* do not divest state courts of cognizance over all disputes among Indians. *Where, as here, state law is implicated, governs the transaction and is invoked, and there is no infringement upon tribal self-government, there can be no barrier to state cognizance.*

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[28] *Kennerly, supra* note 24, 400 U.S. at 430, 91 S.Ct. at 483. If states can *only* assume civil jurisdiction by complying with the terms of PL-280, Indian tribes must choose between exclusive state court jurisdiction and exclusive tribal court jurisdiction. *Id.*, 400 U.S. at 431, 91 S.Ct. at 485 (Stewart, J., dissenting).

[29] Fisher v. District Court, 424 U.S. 382, 96 S.Ct. 943, 47 L.Ed.2d 106 (1976) (*per curiam*). In *Fisher* the custodians of an Indian child commenced an adoption proceeding in state court. Relying on a federal statute, 25 U.S.C. § 372a, the Montana Supreme Court recognized concurrent state and tribal jurisdiction over adoption of Indians. The Court pronounced that state-court cognizance infringed upon tribal self-government and held Montana divested of her concurrent jurisdiction.

[30] *Id.*, 424 U.S. at 388, 96 S.Ct. at 947.

[31] *Fisher, supra* note 29; *Williams, supra* note 26.

The U.S. Supreme Court's jurisprudence clearly supports the notion that not every controversy affecting Indians and their lands lies outside state-court jurisdiction.[32] In *Oklahoma Tax Commission v. Graham*[33] the Court held recently that a trial sovereign immunity counterclaim, pressed in a state-court suit to enforce a tax assessment against an Indian tribe for its cigarette sales and bingo receipts, *is not removable to a federal forum;* it remains cognizable in a state court. In *Cotton Petroleum Corp. v. New Mexico*[34] the Court similarly held that unless pre-empted by federal law, New Mexico can tax on-reservation production of oil and gas by non-Indian lessees.[35]

In sum, whenever Indian interests are tendered in a controversy, a state court must make a preliminary inquiry into the nature of the rights sought to be settled.[36]

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[32] *See, e.g.*, Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 175, 109 S.Ct. 1698, 1707, 104 L.Ed.2d 209 (1989); Oklahoma Tax Commission v. Graham, 489 U.S. 838, 109 S.Ct. 1519, 1521, 103 L.Ed.2d 924 (1989) (*per curiam*).

[33] *Supra* note 32.

[34] *Supra* note 32.

[35] *See* discussion of the distinction between federal pre-emption concept and the congressional ouster-of-jurisdiction doctrine in Part III(A), *infra.*

[36] For a case where a court failed to take into consideration the character of relationship which would confer state-court cognizance, *see* State ex rel. Joseph v. Redwing, 429 N.W.2d 49 (S.D. 1985) *cert. denied*, 490 U.S. 1069, 109 S.Ct. 2071, 104 L.Ed.2d 636 (1989). There a court held it had subject matter jurisdiction to establish the amount of and to enforce a child support obligation, even though a tribal court had dissolved the Indian marriage and ordered the father to pay child support (apparently without setting the quantum of obligation).

Only that litigation which is explicitly withdrawn by Congress or that which infringes upon tribal self-government stands outside the boundaries of permissible state-court cognizance. With this test in mind, we revisit today extant Oklahoma jurisprudence on the constitutional state/federal allocation of judicature.[37]

In *Housing Authority of the Seminole Nation v. Harjo*,[38] a case which followed the path pursued by *Ahboah v. Housing Authority of Kiowa Tribe*,[39] this court concluded and proceeded on the assumption that *all* litigation among Indians lies *dehors* state-court jurisdiction. Its plainly overbroad statement resulted in excessive self-abnegation of power and a wholesale retreat from judicature that does not accord with the constitutional principles we analyze and explain today in Part III, *infra*.

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[37] *Ahboah, supra* note 21; Housing Authority of the Seminole Nation v. Harjo, Okl., 790 P.2d 1098 (1990).

[38] *Supra* note 37. Relying upon a mechanical analysis of "Indian Country," *Harjo* holds that an Oklahoma court has *no* authority to adjudicate a forcible entry and detainer action arising from tenancy in Indian Country.

[39] *Supra* note 21. *Ahboah* holds that a state court cannot entertain jurisdiction over a forcible entry and detainer proceeding against the beneficial owner of a trust allotment *in lands located within Indian Country.*

III.

OUSTER OF STATE-COURT JURISDICTION

A.

Under This Nation's Dual Sovereignty Scheme And Dual Court System, State Courts Lose Their Concurrent Jurisdiction Only When Ousted By An Explicit Congressional Directive

The Authority asserts that state courts have *no* jurisdiction over contract actions involving lands in Indian Country, regardless of the property's status when the sale took place. For this principle the Authority relies on Oklahoma jurisprudence, *Ahboah*[40] and *Harjo.*[41] We now reject the notion of an all-inclusive congressional ouster as an incorrect exposition of the pertinent constitutional principles.

Our specific task today calls for an inquiry into whether Oklahoma courts stand *ousted of their concurrent* jurisdiction over this contract action by Indian plaintiffs against a state-created IHA. Under our system of federalism, a state's sovereignty is concurrent with that of the federal government, subject only to limitations imposed by the Supremacy Clause.[42] *Yellow Freight System, Inc. v.*

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[40] *Supra* note 21.

[41] *Supra* note 37.

[42] Art. 6, cl. 2, U.S. Const. Justice Scalia discusses the constitutional underpinnings for the dual sovereignty concept in his concurring opinion in Tafflin v. Levitt, 493 U.S. 455, 469, 110 S.Ct. 792, 800-801 (1990), where he says:

> "State courts have jurisdiction over federal causes of action not because it is 'conferred' upon them by the Congress; nor even because their inherent powers

Donnelly[43] teaches that "state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States."[44] "To give federal courts exclusive jurisdiction

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permit them to entertain transitory causes of action arising under the laws of foreign sovereigns, see, *e.g.*, *McKenna v. Fisk*, 1 How. 241, 247-249, 11 L.Ed. 117 (1843); but because '[t]he laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. . . . The two together form one system of jurisprudence, which constitutes the law of the land for the State' and the courts of the two jurisdictions are not foreign to each other. . . . " *Claflin v. Houseman*, 93 U.S. 130, 136-137, 23 L.Ed. 833 (1876); see also *Minneapolis & St. Louis R. Co. v. Bombolis*, 241 U.S. 211, 221-223, 36 S.Ct. 595, 598-599, 60 L.Ed. 961 (1916).

It therefore takes an affirmative act of power under the Supremacy Clause to oust the States of jurisdiction – an exercise of what one of our earliest cases referred to as 'the power of congress to *withdraw*' federal claims from state-court jurisdiction. *Houston v. Moore*, 5 Wheat. 1, 26, 5 L.Ed. 19 (1820) (emphasis added). See also *Bombolis, supra*, 241 U.S., at 221, 36 S.Ct., at 598 (concurrent jurisdiction exists 'unless excepted by express constitutional limitation or by valid legislation'); *Missouri ex rel. St. Louis, B. & M.R. Co. v. Taylor*, 266 U.S. 200, 208, 45 S.Ct. 47, 48, 69 L.Ed. 247 (1924) ('As [Congress] made no provision concerning the remedy, the federal and the state courts have concurrent jurisdiction')."

[43] 494 U.S. 820, 110 S.Ct. 1566, 108 L.Ed.2d 834 (1990).

[44] *Yellow Freight, supra* note 43, 494 U.S. at ___, 110 S.Ct. at 1568 (quoting from *Tafflin, supra* note 42, 493 U.S. at 458-460, 110 S.Ct. at 795, and citing Claflin v. Houseman, 93 U.S. 130, 136-137, 23 L.Ed. 833 (1876), and Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 477-478, 101 S.Ct. 2870, 2874-2875, 69

over a federal cause of action, Congress must, in an exercise of its powers under the Supremacy Clause, affirmatively divest state courts of their presumptively concurrent jurisdiction."[45] In *Gulf Offshore v. Mobil Oil* the Court identified three different methods by which a congressional state-court ouster may be effected[46] – (1) by an explicit statutory directive,[47] (2) by unmistakable implication

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L.Ed.2d 784 (1981). *See also Houston v. Moore*, 5 Wheat. 1, 25-26, 5 L.Ed. 19 (1820); Plaquemines Tropical Fruit Co. v. Henderson, 170 U.S. 511, 517, 18 S.Ct. 685, 688, 42 L.Ed. 1136 (1898); Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 507-508, 82 S.Ct. 519, 522-523, 7 L.Ed.2d 483 (1962).

[45] *Yellow Freight, supra* note 43, 494 U.S. at ___, 110 S.Ct. at 1568 (quoting from *Tafflin, supra* note 42, 493 U.S. at 458-460, 110 S.Ct. at 795). "This deeply rooted presumption in favor of concurrent state court jurisdiction is . . . *rebutted if Congress affirmatively ousts the state courts of jurisdiction* over a particular federal claim." *Tafflin, supra* note 42, 493 U.S. at ___, 110 S.Ct. 792 at 795. *Gulf Offshore, supra* note 44, teaches that "[i]n considering the propriety of state-court jurisdiction over any particular federal claim, the Court begins with the presumption that state courts enjoy concurrent jurisdiction. Congress, however, may confine jurisdiction to the federal courts either explicitly or implicitly." *Id.*, 453 U.S. at 478, 101 S.Ct. at 2875 (emphasis added).

[46] *Gulf Offshore, supra* note 44, 453 U.S. at 478, 101 S.Ct. at 2875; *Tafflin, supra* note 42, 493 U.S. at 458-460, 110 S.Ct. at 795. The Court has suggested that the factors identified in *Gulf Offshore, supra* note 44, are the *sole* means of resolving a claim to exclusive federal-court jurisdiction. *See* Hathorn v. Lovorn, 457 U.S. 255, 266, 102 S.Ct. 2421, 2428, 72 L.Ed.2d 824 (1982) ("Only . . . [the *Gulf Offshore* factors] will rebut the presumption [of concurrent jurisdiction]").

[47] In *Tafflin, supra* note 42, Justice Scalia observes that "[i]n the standard fields of exclusive federal jurisdiction, the governing statutes specifically recite that suit may be brought 'only' in federal court, Investment Company Act of 1940, as amended, 84

from legislative history, or (3) by a clear incompatibility between state-court jurisdiction and federal interests.[48]

The constitutional ouster-of-jurisdiction doctrine is not to be confused with federal preemption. Preemption occurs when federal law *displaces* a body of state law on the same subject. Unlike state-court ouster, which

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Stat. 1429, 15 U.S.C. § 80a-35(b)(5); that the jurisdiction of the federal courts shall be 'exclusive,' Securities Exchange Act of 1934, as amended, 48 Stat. 902, 15 U.S.C. § 78aa; Natural Gas Act of 1938, 52 Stat. 833, 15 U.S.C. § 717u; Employee Retirement Income Security Act of 1974, 88 Stat. 892, 29 U.S.C. § 1132(e)(1); or indeed even that the jurisdiction of the federal courts shall be 'exclusive of the courts of the States,' 18 U.S.C. § 3231 (criminal cases); 28 U.S.C. §§ 1333 (admiralty, maritime and prize cases), 1334 (bankruptcy cases), 1338 (patent, plant variety protection, and copyright cases), 1351 (actions against consuls or vice consuls of foreign states), 1355 (actions for recovery or enforcement of fine, penalty, or forfeiture incurred under Act of Congress), 1356 (seizures on land or water not within admiralty and maritime jurisdiction)." *Id.*, 493 U.S. at 469, 110 S.Ct. at 801-802 (Scalia, J., concurring).

[48] Justice Scalia observes in *Tafflin*, *supra* note 42, that: "It is perhaps also true that implied preclusion can be established by the fact that a statute expressly mentions only federal courts, plus the fact that state-court jurisdiction would plainly disrupt the statutory scheme. That is conceivably what was meant by the third part of the *Gulf Offshore* dictum, 'clear incompatibility between state-court jurisdiction and federal interests.' . . . If the phrase is interpreted more broadly than that, however – if it is taken to assert some power on the part of this Court to exclude state-court jurisdiction when systemic federal interests make it undesirable – it has absolutely no foundation in our precedent." *Id.*, 493 U.S. at ___, 110 S.Ct. at 801 (Scalia, J., concurring).

requires that we examine the law for the presence of an "explicit statutory directive" conferring *exclusive* federal-court jurisdiction, preemption is a *matter of congressional intent,*[49] which may be effected even by regulations of a federal agency acting within the scope of congressionally delegated authority.[50] *Preemption alone* cannot divest state courts of jurisdiction to entertain federal-law claims.

Because *Ahboah*[51] and *Harjo*[52] both failed to take into account the constitutional underpinnings for the concurrent state-court jurisdiction analysis, we may today reassess the nisi prius cognizance of the present cause free from the binding force of precedential restraint. It is fitting for us to revisit here the congressional ouster notions and infuse our law with *Yellow Freight's* teaching that *a state court has constitutionally invested authority over any claim or issue affected or regulated by federal law, which is*

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[49] Pre-emption may occur in four distinct instances: (1) by express statutory language; (2) by a pervasive regulatory scheme which infers the presence of congressional intent that the federal regulation did not need supplemental state-law provisions; (3) when an actual conflict between state and federal laws makes it impossible to comply with both; or (4) where the objectives and purposes of Congress are thwarted by state law. Todd v. Frank's Tong Service, Inc., Ok., 784 P.2d 47, 49 (1989); Missouri-Kansas-Texas R. Co. v. State, Okl., 712 P.2d 40, 47 (1985).

[50] City of New York v. F.C.C., 486 U.S. 57, 64, 108 S.Ct. 1637, 1642, 100 L.Ed.2d 48 (1988); Fidelity Federal Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664, 675 (1982).

[51] *Ahboah, supra* note 21.

[52] *Harjo, supra* note 37.

not expressly withheld from its jurisdiction by an act of Congress.

The Authority has directed our attention to the 1937 Act,[53] but we find nothing in that enactment which would suggest that Congress has, by some explicit statutory directive, ousted the state courts of cognizance over *contract disputes between state-created IHAs and their Indian project participants.* The 1937 Act clearly authorizes the establishment of IHAs *in conformity to state law* for the purpose of providing low-income housing projects for Indians.[54] Nor are we aware of any legislative history that Congress by "unmistakable implication" intended to assign IHA-spawned disputes with Indian purchasers *only* to federal courts.[55] We next inquire into whether "state-court jurisdiction over Indians or activities on Indian lands *would interfere with tribal sovereignty and self-government.*"[56] In those instances, the Court advises, "the state courts are generally *divested of jurisdiction as a matter of federal law.*"[57] Although in its petition in error the

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[53] For a discussion of the 1937 Act, see *supra* note 5 and accompanying text.

[54] The terms of 24 C.F.R. § 905.125(1990) are:

> "An IHA may be established pursuant to a State law that provides for the establishment of IHAs with all necessary legal powers to carry out low-income housing projects for Indians."

[55] *Gulf Offshore, supra* note 44, 453 U.S. at 478, 101 S.Ct. at 2875.

[56] Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 15, 107 S.Ct. 971, 976, 94 L.Ed.2d 10 (1987) (citing *Fisher, supra* note 29, and *Williams, supra* note 26).

[57] *LaPlante, supra* note 56, 480 U.S. at 15, 107 S.Ct. at 976.

Authority relied for reversal on sovereign immunity of the Tribe, it has not argued that issue on appeal.[58] In fact, the Authority's reply brief informs us that its challenge on that point has been abandoned.[59]

Because the Authority has failed to overcome the U.S. Constitution's presumption that state courts have jurisdiction, concurrent with federal courts, to hear claims arising under the 1937 Act, we affirm the trial court's ruling that upholds its subject matter cognizance over these Indian purchasers' claim to title. Today's

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[58] Claims to error for which there is no support in argument and authority are deemed abandoned. Hadnot v. Shaw, Okl. 826 F.2d 978. 981 (1992); Hobert v. Echeverria, Okl. 744 F.2d 960. 962 n. 4 (1987; Peters v. Golden Oil Co., 600 P.2d 330, 331 (1979); Harley v. Jose, 207 Okl. 296, 249 P.2d 468, 469 (1952).

[59] The Authority states that all issues relating to the sovereign immunity of the Tribe were abandoned because of the "confusion in the record" concerning its status as a tribal agency. *The Authority explains that HUD failed to recognize it as an agency operating under tribal rather than state law.*

By its mid-appeal brief the Authority informs this court *that HUD had approved its 1993 amendment of the 1983 Sac and Fox Indian Housing Authority Act.* According to the Authority, the 1993 version provides that the Authority shall be an *agency of the Sac and Fox Nation* of Oklahoma having the purposes, powers and duties . . . as established by law," (Emphasis added.) This change, the Authority urges, supports its argument that the contested property lies in Indian Country and that its reservation of the mineral interest accords with applicable federal law and regulations. As we view the mid-appeal development it has no legal effect on the *rights* in contest. State-court jurisdiction attached to this claim at the time it first came before the court. Amarex, Inc. v. Sell, Okl., 566 P.2d 456, 459 (1977); Jones Drilling Company v. Woodson, Okl., 509 P.2d 116, 118 (1973).

pronouncement is not to be understood as a broad declaration that *all* litigation of Indian rights lies within the inherent constitutional cognizance of Oklahoma state courts. *We only hold that, when measured by the Gulf Offshore analysis, state-court settlement of this controversy does not contravene any federal policy, either constitutional or statutory.*

IV

THE DOCUMENT IN CONTEST – THE PARTIES' MHO AGREEMENT – IS A CONTRACT TO CONVEY THE ENTIRE FEE UPON FULL PERFORMANCE OF ITS TERMS

A.

The Oklahoma Law of Conveyancing, Rather Than Tribal Law, Governs The Settlement Of This Dispute

The Authority requested that the trial court take judicial notice[60] of four tribal laws which had been filed with its pre-trial brief.[61] Pertinent here is a 1987 amendment to

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[60] Taking judicial notice means *only* that we may *dispense with proof* of some norm of state and federal law – common, constitutional, or statutory law – of which the court may be advised *sans* proof. The terms of 12 O.S.1991 § 2201(A) require us to take "judicial notice" of law *that is invoked* in the adversary process. The terms of § 2201(A) are:

> "Judicial notice shall be taken by the court of the common law, constitutions and public statutes in force in every state, territory and jurisdiction of the United States."

[61] Those laws are: (1) Sac and Fox Resolution 66-4, which creates the Housing Authority; (2) Sac and Fox Housing Authority Act of 1983, which designates the Authority as "an agency"

the 1983 Sac and Fox Housing Authority Act. The 1987 law *requires* the Authority to *retain* title to any mineral interest acquired by it in fee simple and to deposit all revenues and proceeds derived from that interest into special account for tribe-related purposes.[62] The Authority

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of the Sac and Fox Tribe; (3) Sac and Fox Resolution 86-51, which relates to judicial resolution of disputes involving the Housing Authority; and (4) Sac and Fox Resolution 87-75, which adds § 306 to the 1983 Sac and Fox Housing Authority Act.

[62] The 1987 tribal resolution adds § 306 to the Sac and Fox Housing Authority Act as established January 21, 1983. Lewis did not object below to nisi prius notice of the 1987 resolution, which the Authority had attached to its pre-trial brief. The pertinent terms of § 306 are:

"MINERAL INTERESTS IN REAL PROPERTY

(a) Title to any mineral interests, including oil and gas interest, acquired by the Authority, in fee simple, due to its acquisition of real property by purchase, gift, or otherwise is hereby declared to be and is severed and vested in the Housing Authority of the Sac and Fox Tribe of Indians of Oklahoma, and the Authority shall make such its conveyances of real property in such form as may be necessary to clarify such severance and vesting of title in the record."

* * *

(c) All revenues and proceeds derived from said mineral interest shall be deposited in a special account maintained by the authority for the following purposes:

(1) operational expenses of the Housing Authority, or

(2) improvements or additions, including repairs, to existing projects,

(3) construction or acquisition of new projects.

(d) A conveyance of mineral interests other than as authorized in Subsection (b) of this section may be

asserts that its construction of the MHO Agreement[63] – as calling for a conveyance of a surface estate to Lewis and for the mineral interest's reservation by the Authority – is in compliance with the 1987 tribal law.

One who asserts that a law different from that of Oklahoma governs the dispute bears the burden of identifying and invoking that other law. Unless foreign law is invoked, Oklahoma's domestic law will be deemed to govern.[64] We agree *with the trial court and hold that the Oklahoma contract law and that of conveyancing, rather than tribal law, is applicable to this claim by the Indian purchasers.* The trial court ruled that (1) when Lewis entered into the 1974 MHO Agreement the project land was *not situated within a dependent Indian community* and was not otherwise constituted as Indian Country, and (2) the MHO Agreement was executed *before* the Tribe reorganized the Authority in 1983 as a tribal agency.[65] *Both at the time of the property's tribal acquisition as well as of the Lewis contract's execution, the Authority was operating as a state agency under the Oklahoma Housing Authorities Act.*[66] *The Sac and Fax law, which had initially created the Tribe's Housing Authority under the state act, had neither been repealed*

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made only with the consent of the Sac and Fox Business Committee. * * * "

[63] For a discussion of the Lewis/Authority MHO Agreement, see Part I, *supra.*

[64] Benham v. Keller, Okl. 673 P.2d 152, 153 (1983).

[65] According to the authority Director, HUD approval is not required to infuse validity into tribal housing laws; it is only necessary to receive funding.

[66] *Supra* note 11.

nor revoked. It stood in full force and effect when the property was acquired by the Indian housing agency and when it was sold to Lewis.

In short, when the parties entered into the MHO Agreement, the project area involved was not, as the trial court correctly ruled, a "dependent Indian community".[67] Neither was the project site Indian Country when the Authority conveyed the premises to Lewis. We hence hold that for the reasons *further* explained later in this opinion, state contract law and that of conveyancing, rather than tribal law, is applicable to the MHO Agreement, in contest and to the title claim of these Indian purchasers.

When construing the phrase *dependent Indian community*, the U.S. Court of Appeals for the Tenth Circuit must take into account "the nature of the area in question, the relationship of the inhabitant of the area to Indian tribes, and to the federal government, and the established practice of government agencies toward the area."[68] A more elaborate set of factors was identified by the Eighth Circuit in *United States v. South Dakota*[69] – i.e., (1) whether the United States has retained "title to the lands which it permits the Indians to occupy" and authority to enact regulations and protective laws respecting this territory; (2) the nature of the area in question, the relationship of

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[67] For the definition of "dependent Indian community", see 18 U.S.C. § 1151(b), *supra* note 16.

[68] United States v. Martine, 442 F.2d 1022, 1023 (10th Cir. 1971).

[69] 665 F.2d 837 (8th Cir. 1981), *cert. denied*, 459 U.S. 823, 103 S.Ct. 52, 74 L.Ed.2d 58 (1982).

the inhabitants of the area to Indian tribes and to the federal government, and the established practice of government agencies toward the area; (3) whether there is an element of cohesiveness manifested either by economic pursuits in the area, common interests, or needs of the inhabitants as supplied by that locality; and (4) whether such lands have been set apart for the use, occupancy and protection of dependent Indian Peoples.[70] *The ultimate test is whether the land is set apart for the use of Indians under the superintendence of the federal government.*[71]

The trial court concluded that the *property in contest was not an independent Indian community* when the contract was executed in 1974. *This is so because at that time the provisions of tribal health, police, social and food services were not in effect.* We agree with the trial court's analysis and its reasoning. *When title passed from the Authority to Lewis, the property was not Indian Country.* As this point HUD's oversight (via its extensive federal regulations of MHO programs) came to an end. Lewis had performed all the obligations imposed by the MHO Agreement when the Authority executed its warranty deed. Because we can find *no* basis for applying tribal law to this dispute, we proceed to construe these Indian purchasers' rights in accordance with Oklahoma law.

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[70] *South Dakota, supra* note 69 at 841-843.

[71] United States v. Pelican, 232 U.S. 442, 449, 34 S.Ct. 396, 399, 58 L.Fd. 676 (1914).

B.

Rules for Construing A Contract To Convey Real Property

Whether a contract is ambiguous so as to require extrinsic evidence to clarify the doubt is a question of law for the courts.[72] If language of a contract is clear and free of ambiguity, the court is to interpret it as a matter of law.[73]

At the conclusion of the trial, the nisi prius court informed the parties that the controlling legal issue was whether the definition of the critical word "grounds" (inserted into the MHO Agreement) includes a mineral interest.[74] The court directed the parties to submit post-trial briefs. Neither Lewis nor the Authority objected to briefing this issue as one of law, either at trial or in their post-trial submissions. By their conduct the parties clearly manifested a desire to have the contract terms interpreted as a matter of law, rather than in the light of some intent to be gathered from extraneous evidence and circumstances. The contract's meaning tendered to the

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[72] Cook v. Oklahoma Bd. of Public Affairs, Okl., 736 P.2d 140, 145 (1987); Mercury Inv. Co. v. F.W. Woolworth Co., Okl., 706 P.2d 523, 529 (1985); Ollie v. Rainbolt, Okl., 669 P.2d 275, 279 (1983); Farrell Const. Co., Inc. v. Russell Creek Coal Co., Okl., 645 P.2d 1005, 1007 (1982).

[73] *Mercury, supra* note 72 at 529.

[74] The trial judge asked the lawyers to tell him whether the word "grounds" is "a legal synonym for the term 'real estate' or 'real property'," or whether it "has a restricted meaning".

trial court was to be divined from the four corners of the instrument.[75]

A contract must be considered as a whole so as to give effect to all its provisions without narrowly concentrating upon some clause or language taken out of context.[76] *The language in a contract is given its plain and ordinary meaning unless some technical term is used in a manner intended to convey a specific technical concept.*[77] The parol evidence rule teaches that unless fraud or mistake is involved, pre-contract negotiations and oral discussions are merged into, and superseded by, the terms of an executed writing.[78] The *practical* construction of an agreement (to be derived from the acts and conduct of the parties) is an available tool *only* in case ambiguity appears to be present. *Where, as here, a contract is complete*

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[75] For our statutory rules for the construction of contracts, *see* 15 O.S. 1991 §§ 151-157. The terms of § 153 are:

> "For the purpose of ascertaining the intention of the parties to a contract, if otherwise doubtful, the rules given in this chapter are to be applied."

[76] 15 O.S.1991 § 157; *Mercury, supra* note 72 at 529.

[77] 15 O.S.1991 § 160; *Mercury, supra* note 72 at 529.

[78] 15 O.S. 1991 §§ 137, 155; *Mercury, supra* note 72 at 529. Under the terms of § 137, referred to generally as the parol evidence rule, testimonial evidence may be admissible to vary or contradict the terms of a written contract when fraud, accident or mistake is relied upon for relief from the binding effect of a contract. Snow v. Winn, Okl., 607 P.2d 678, 682 (1980); Dewberry v. Yellow Manufacturing Acceptance Corp., Okl., 396 P.2d 522, 524 (1964); Lone Star Gas Company v. Oakman, Okl., 283 P.2d 810, 813-814 (1955). Here, the parties have not relied upon fraud, accident or mistake to vary the written terms of the document.

in itself and, when viewed as a totality, is unambiguous, its language is the only legitimate evidence of what the parties intended. That intention cannot be determined from the surrounding circumstances, but must be gathered from a four-corners' examination of the instrument. Because the parties proceeded on the premise the issue before the court was one of law, and nowhere interposed an objection to that notion, we hold them bound by their nisi prius positional commitment.

C.

The Term "Grounds" In The MHO Agreement Includes Both The Surface and Mineral Estate

The Authority asserts that from a four-corners' examination of the MHO Agreement it is apparent there was to be a severance of the surface and mineral estates upon the completion of the contract's terms. The critical terms, relied on by the Authority, provide that when the purchasers have paid back all Authority-borrowed money, "the Authority will convey to the Participant *all of its interest in his house and grounds.*" The term "grounds", when considered in the context of the entire MHO Agreement, the Authority argues, calls for conveying to Lewis *but a surface estate* while reserving the mineral interest in the grantor. In support of its contention that the word "grounds" is one of limitation, the Authority directs us to

several dictionary definitions of the term.[79] We find these sources unpersuasive.[80]

Lewis argue that the general use of the word grounds is not limited to the appurtenances and the surface surrounding the house. They assert that the contract phrase – "will convey *all* of its interest in his house and grounds" – means that the Authority *was to retain no interest in the property.* They rely on an early Pennsylvania case in

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[79] The Authority directs us to the definition of the terms *grounds* in (1) WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY (1967) – "a surrounding area . . . the surface of the earth . . . the area around and belonging to a house or other building; (2) WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY at 1002 (1961) – "the gardens, lawn, and planted areas immediately surrounding and belonging to a house or other building; and (3) BLACK'S LAW DICTIONARY (4th Ed. 1951) – "soil; earth; the earth's surface appropriated to private use and under cultivation or susceptible of cultivation. Though this term is sometimes used as equivalent to 'land,' it is properly of a more limited signification, because it applies strictly only to the surface and always means dry land. *See* Wood v. Carter, 70 Ill.App. 218; State v. Jersey City, 25 N.J.L. 529; Com. v. Roxbury, 9 Gray, Mass., 491". The Authority asserts that other reference materials demonstrate that the term "ground" does not include minerals, *citing* WEBSTER'S COLLEGIATE THESAURUS at 390, WEBSTER'S NEW DICTIONARY OF SYNONYMS at 384 and WILLIAM C. BURTON, LEGAL THESAURUS at 243 and 915.

[80] Our research reveals that some legal reference materials include the word "ground" in the same grouping as land or real property. *See, e.g.,* (1) ROGETS INTERNATIONAL THESAURUS, 4th Ed. (1977) at 286 (land) – "land, ground, earth. . . . real estate, real property . . . "; (2) J.I. RODALE, THE SYNONYM FINDER (1978) at 475 – "ground, n. 1. . . . *Archaic,* . . . land . . . " 2. grounds . . . property . . . "; (3) WILLIAM C. BURTON, LEGAL THESAURUS (1980) at 741 – "ground . . . property (*land*) . . . , grounds . . . estate (*property*) . . . property (*land*). . . . "

which the court held the word ground was synonymous with lands.[81]

Grounds is not a common-law term of art in the law of real property. Unlike the noun "surface",[82] the word "ground" has no defined meaning in the body of Oklahoma's common law. Within the context of the MHO Agreement, we treat the latter term as synonymous with land. In its general sense, *land* includes not only the face of the earth, but everything of a permanent nature under or over it. In this sense, it embraces both the surface of the earth and minerals, oil and gas found below the earth's face.[83] Land is defined by our statute as "the solid

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[81] In Feree v. Sixth Ward School Dist. of Allegheny, 76 Penn. 376, 378 (1874), the court held the word "ground" in a 1867 act was synonymous with the word "lands". This construction of the noun "ground" enabled a school district to enter upon an improved town lot to erect a school-house building.

[82] Mac Oil Company v. Laurance, Okl., 389 P.2d 955, 960 (1964); Reidt v. Rock Island Improvement Company, Okl., 521 P.2d 79, 83 (1974). In *Reidt* the court noted that the term "surface", if used to denote that which is conveyed in a real estate deed, may, without further delineating words, be one of limitation. *Id.*, syllabus 3.

[83] At common law, land is deemed to extend from the center of the earth to the sky. This concept is expressed in the maxim – *a centro usque ad coelum*. BLACK'S states the maxim more fully – *cujus est solum ejus est usque ad coelum et ad inferos* – which means that "the owner of the soil owns to the heavens and also to the lowest depths." BLACK'S LAW DICTIONARY 5th Ed. at 22 and 341 (1979). *See* Brandes v. Mitterling, 196 P.2d 464, 467 (Ariz. 1948), where the court notes that the maxim has been applied "through the ages in a variety of circumstances," and observes that it *has been rejected in cases that measure a landowner's right in the airspace above. Id.* at 467, *citing* United States v. Causby, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (Ct.Cl. 1946).

material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock or other substance."[84] The owner of land in fee has the right to the surface and to everything permanently situated beneath or above it."[85] The term land has a definite meaning that is synonymous with the word "real property."[86] Real property is defined by statute as "Land . . . [t]hat which is affixed to land. . . . [t]hat which is incidental or appurtenant to land. . . . [and] [t]hat which is immovable by law."[87]

Having determined that the noun "grounds" is not to be taken as a word of limitation, we next consider whether *from a four-corners' examination* of the MHO Agreement, the parties may have intended that, at the termination of the contract, only the surface estate be conveyed to Lewis while a mineral interest stand reserved in the grantor. To create a reservation it must appear from the instrument that the grantor intended by apt words to retain some interest from the estate conveyed. A grantor in a deed is presumed to have made all the reservations intended to be made. One cannot derogate from one's grant by showing *that some reservation was*

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[84] 60 O.S.1991 § 6.

[85] 60 O.S.1991 § 64.

[86] The terms of 25 O.S.1991 § 26(2) provide:
"1. the word 'property' includes property, real and personal.
2. The words 'real property' are coextensive with lands, tenements and hereditaments. * * * "

[87] The terms of 60 O.S.1991 § 5 define real property as "1. Land. 2. That which is affixed to land. 3. That which is incidental or appurtenant to land. 4. That which is immovable by law."

intended but went unexpressed. There is a statutory presumption that every estate in land which is conveyed by deed shall be deemed an estate in fee simple unless limited by express words.[88] These guiding principles are clearly applicable in assessing the measure of rights created by the MHO Agreement under review. *We hence conclude from a four-corners' examination of the Lewis/Authority contract that no interest was intended to be reserved in the Authority.*

SUMMARY

We hold that, absent *any* explicit congressional directive in the 1937 Act to withdraw from state-court cognizance contractual disputes to arise *between state-created IHAs and their Indian homebuyers,* a state district court has jurisdiction to hear these parties' contract-based claims. State courts have constitutionally-invested cognizance, concurrent with federal courts, to entertain *any* federal-law claim not explicitly withdrawn from their authority by some congressional enactment, so long as state judicature does not infringe upon tribal self-government.

An intent to reserve a mineral interest in the grantor *may not be implied* in a contract which promises to convey to the grantee *all of the grantor's interest in the "house and grounds"*. The MHO Agreement in contest, written in plain, clear and unambiguous language, unmistakably

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[88] The terms of 16 O.S.1991 § 29 are:

"Every estate in land which shall be granted, conveyed or demised by deed or will shall be deemed an *estate in fee simple* and of inheritance, *unless limited by express words.*" (Emphasis added.)

Bryan v. Everett, Okl., 365 P.2d 146, 147-148 (1961).

reveals the parties' intent to convey fee simple title to the Indian purchasers upon their full performance of that agreement.

THE TRIAL COURT'S JUDGMENT IS AFFIRMED.

HODGES, C.J., and SIMMS, HARGRAVE, OPALA, WILSON AND WATT, JJ., concur;

LAVENDER, V.C.J., concurs in result;

KAUGER and SUMMERS, JJ., dissent.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

JOANN LEWIS and JAMES F. LEWIS, Husband and Wife, Plaintiffs-Appellees, MAJORIE L. WOLFE, Plaintiff, v. THE SAC AND FOX TRIBE OF OKLAHOMA HOUSING AUTHORITY, a/k/a THE HOUSING AUTHORITY OF THE SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA, a/k/a HOUSING AUTHORITY OF THE SAC & FOX NATION, a/k/a SAC AND FOX INDIAN HOUSING AUTHORITY OF OKLAHOMA, Defendant-Appellant.	)	No. 78,825 FOR OFFICIAL PUBLICATION (Filed Feb. 9, 1994)

SUMMERS, J., Dissenting;

The majority frames the jurisdiction issue as whether Oklahoma has been "ousted" from its "concurrent jurisdiction." It disregards United States Supreme Court case law as well as recent Oklahoma case law[1] squarely in

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[1] *Housing Authority of Seminole Nation v. Harjo*, 790 F.2d 1098 (Okla. 1990), is effectively overruled by today's majority opinion. Other cases which are overruled, although not expressly, are *Ahboah v. Housing Authority of Kiowa Tribe*, 660 P.2d 625 (Okla. 1983), *Barnett v. Newcomer*, 307 P.2d 148 (Okla. 1957), and *Swain v. Hildebrand*, 36 P.2d 924 (Okla. 1954).

point, and instead relies predominately on two United States Supreme Court cases dealing with "ouster." In so doing, the majority makes the assumption that the state has concurrent jurisdiction with the federal and tribal courts, and pays no heed to the abundance of United States Supreme Court law dealing with the extremely narrow jurisdiction held by a state over Indian affairs in Indian country.[2]

The majority's explanation of *Gulf Offshore v. Mobil Oil Corp.*, 453 U.S. 473 (1981) and *Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820 (1990) may be correct when applied in the proper context; however, these two cases have no relevance in this setting, and are not applicable when the state's jurisdiction is questioned because of an assertion that the event took place in Indian country. The United States Supreme Court has held, in similar instances, that application of principles derived in other areas of law are generally not helpful when attempting to resolve an issue which arose in Indian country. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). Because of the special relationship between a tribe and the federal and state governments, such questions must be resolved in light of historical concepts regarding Indians. *Id.; see also* Cohen, *Handbook of Federal Indian Law* 259-280 (1984).

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[2] A conflict between this Court's resolution and those resolutions of the federal appeals court is reason for the United States Supreme Court to grant certiorari. *DeCoteau v. District County Court*, 420 U.S. 425, 430 (1974).

No party to this lawsuit raised or addressed the issue of "ouster" or "concurrent jurisdiction." Rather, they correctly framed the issue as one which focuses on whether the state courts have jurisdiction over a contract dispute involving an Indian housing authority.[3] The housing authority urges that the state lacks jurisdiction because the land dispute arose in a dependent Indian community which is included within the statutory definition of "Indian country." The Lewises disagree, urging that state courts have jurisdiction because the housing authority was created and incorporated under state law.

"With the adoption of the Federal Constitution, *Indian relations became the exclusive province of federal law.*" *Oneida County, N.Y. v. Onieda Indian Nation of N.Y. State,* 470 U.S. 226, 234 (1984) *reh. denied,* 471 U.S. 1062 (1984) (Emphasis added); U.S. Constitution Article I, Section 8, Clause 3; U.S. Constitution, Article VI, Clause 2. The basic issue is simply whether the transaction occurred in Indian country. If it did not, the state may clearly assume jurisdiction and resolve the matter. However, if it did occur in Indian country, further analysis of Supreme Court law is necessary to determine where jurisdiction rests. "Numerous cases confirm the principle that the Indian country classification is the benchmark for approaching the allocation of federal, tribal, and state authority with respect to Indians and Indian lands." *Indian Country, U.S.A. v. Oklahoma Tax Comm'n,* 829 P.2d

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[3] At least one federal court has held that Oklahoma does not have jurisdiction over general contract disputes which arise in Indian country. *See Richardson v. Malone,* 762 F.Supp. 1463 (N.D.Okla. 1991).

967, 973 (10th Cir. 1987). *cert. denied* 487 U.S. 1218 (1987).[4] Thus, the question of whether this event took place in Indian country is the cornerstone and beginning point of analysis. *Oklahoma Tax Comm'n v. Sac and Fox Nation,* 113 S.Ct. 1985, 1991 (1993).

This framing of the issue does not preclude all state jurisdiction over Indian concerns. It requires that the analysis begin by recognizing that Oklahoma, in its Enabling Act, declined general civil regulatory jurisdiction. Oklahoma Enabling Act, ch. 3335, § 3, 34 Stat. 267, 270 (1906); *see also* Senate Report 699, 1953 U.S. Code Cong. & Adm. News 2409, 2412. Thus, any civil jurisdiction held by this state is a direct result of federal congressional action or federal case law. We, as a court, may not like the idea that we are without jurisdiction to adjudicate certain civil actions dealing with Indian matters. Nevertheless, our guidance comes from the Federal Constitution and its interpretation in judicial opinions. We are bound by the interpretation given in this area by the United States Supreme Court. *See Seneca-Cayuga Tribe v. State ex rel. Thompson,* 874 F.2d 709 (10th Cir. 1989).

In *Williams v. Lee,* 350 U.S. 217 (1958), the United States Supreme Court explained the state's role with regard to jurisdiction over Indian concerns. There, a non-

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[4] Cited as authority for this statement are *Solem v. Bartlett,* 465 U.S. 463, 465 (1984); *DeCoteau v. District County Court,* 420 U.S. 425 (1975); *Kennerly v. District Court,* 400 U.S. 423 (1971); *Cheyenne-Arapaho Tribes of Oklahoma v. Oklahoma,* 618 F.2d 665 (10th Cir. 1980); Cohen's *Handbook of Federal Indian Law* 27-46 (R. Strickland ed. 1982); F. Cohen, *Handbook of Federal Indian Law,* 5-8 (1942).

Indian owned and operated a store on the Navajo Reservation. He brought suit against two on-reservation Indians who had purchased goods from his store on credit and had failed to make payment. The Arizona state court refused to dismiss the action for lack of jurisdiction, and entered judgment on behalf of the store owner. The United States Supreme Court reversed and held that the state had no jurisdiction over the matter. Quoting Chief Justice John Marshall in *Worcester v. Georgia*, 6 Pet. 515, 561 (1832), the Court explained that the laws of the state have no application because the state does not have jurisdiction:

> The Cherokee nation . . . is a distinct community, occupying its own territory . . . in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. *The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.*

Id. at 219 (Emphasis added). The Court held that while there had been slight modifications in the law of *Worcester*, "the basic policy of *Worcester* had remained." *Id.*[5]

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[5] *Williams* and *Worcester* have been consistently followed in jurisprudence concerned with state jurisdiction over Indian affairs. *See, e.g. Fisher v. District Court*, 424 U.S. 382 (1976), reh. denied 425 U.S. 926 (1976); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973); *Rice v. Olson*, 324 U.S. 786 (1945). The concepts have now been further refined to permit a "a more individualized treatment of particular treaties and specific federal statutes." *Mescalero Apache Tribe*, 411 U.S. at 148; *see also Organized*

Williams makes it clear that, unlike the majority's assertion, *Oklahoma does not have concurrent jurisdiction with the federal government if the event took place within Indian country. See also Ex parte Crow Dog,* 109 U.S. 556 (1883). Instead, *there is a presumption against state jurisdiction in Indian country. Indian Country, U.S.A.,* 829 F.2d at 976, citing *Cabazon, supra,* and *Cheyenne-Arapaho Tribes, supra.*

The United States Supreme Court has repeatedly denied jurisdiction to state courts. In *Kennerly v. District Court,* 400 U.S. 423 (1971). There, Indians bought food on credit from a grocery store on the reservation. The store brought suit against the indians in a Montana state court. The United States Supreme Court held that Montana was without jurisdiction over the matter because it had not complied with the terms of Pub.L. 83-280. Again, in *Fisher v. District Court,* 424 U.S. 382 (1976) *reh. denied* 425 U.S. 926 (1976), Montana's jurisdiction was questioned. There, an adoption proceeding had been brought in state court. The Supreme Court held that the tribe had jurisdiction over the adoption and that the state was without jurisdiction.

Later, in *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324 (1983), the Court stated that the rule is not so inflexible as to preclude all jurisdiction absent Congress' consent. Instead, the *Williams* rule was refined: "[U]nder certain circumstances a State may validly assert authority

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Village of Kake v. Egan, 369 U.S. 60 (1962); *New York ex rel. Ray v. Martin,* 326 U.S. 496 (1946). Because I do not believe that this property was located within Indian country, I do not fully discuss the different arenas in which the state may have jurisdiction over Indian country.

over the activities of nonmembers on a reservation, and . . . in exceptional circumstances a State may asset [sic] jurisdiction over the on-reservation activities of tribal members."[6]

Congress has consistently acted to show that the states have only limited power to regulate Indian affairs. *Id.* at 220. The Federal Constitution, in Article I, Section 8, Clause 3, specifically states that "Congress shall have Power . . . To regulate Commerce . . . with Indian Tribes." Furthermore, the United States Supreme Court, as well as federal courts of appeal, have consistently held that this provision of the "Constitution vests the Federal Government with exclusive authority over relations with Indian tribes." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 764 (1985); *see also Bryan v. Itasca County*, 426 U.S. 710, 714 n.2 (1976); *United States v. Mazurie*, 419 U.S. 544, 555 (1975); *Indian Country, U.S.A. v. State ex rel. Oklahoma Tax Comm'n*, 829 F.2d 967, 974 (10th Cir. 1987). The state's lack of jurisdiction has also been affirmed when dealing with the related concept of sovereignty. "[T]ribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), quoting *United States v. Mazurie*, 419 U.S. at 557; *see also Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980); *Indian Country U.S.A., supra.*[7]

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[6] See also *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), reh. denied 448 U.S. 911 (1980); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).

[7] *See generally* Clinton, *American Indian Law* (3d ed.1991), pp. 181-183.

Congress provided a method by which Oklahoma could have assumed jurisdiction over some civil matters arising in Indian country. *United States v. Burnett*, 777 F.2d 593 (10th Cir. 1986) *cert. denied* 476 U.S. 1106 (1985). Under Public Law 83-280, as later amended in 25 U.S.C. §1321 et seq., Congress agreed to cede jurisdiction over civil Indian matters to the states:

> §1322. Assumption by State of civil jurisdiction
>
> (a) Consent of United States; force and effect of civil laws
>
> The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

Under this statute as originally enacted, the state was required to take some affirmative action to extend its jurisdiction to Indian country. Oklahoma did not take any such action. *Id. see also Oklahoma Tax Comm'n v. Sac and Fox Nation*, 113 S.Ct. at 1992. The intent as expressed by congressional reports shows that Congress investigated

the various needs of states and tribes. Tribes were for the most part "agreeable to the transfer of jurisdiction" proposed under Pub.L. 83-280. *Senate Report,* at 2412. However, several states – INCLUDING OKLAHOMA – had in their constitutions expressly disclaimed jurisdiction over Indian land within state borders. The Senate Report states that the effect of such disclaimers was "*to retain exclusive Federal jurisdiction . . .* " (Emphasis added). If the view enunciated in the majority opinion were correct, there would have been no need for federal legislation like Pub.L. 83-280.

Thus, the question is not one of "ouster of concurrent jurisdiction" but is one of state power and authority to adjudicate an [sic] matter occurring in Indian country. While Oklahoma is not completely precluded from regulating affairs on Indian country, it does not have general civil regulatory power or authority to apply all of its general laws. *See Cabazon, infra.* "If state-court jurisdiction over Indians or activities on Indian lands would interfere with tribal sovereignty and self-government, the state courts are generally divested of jurisdiction as a matter of federal law." *Iowa Mutual Ins. Co. v. LaPlante,* 480 U.S. 9 (1987) citing *Fisher v. District Court,* 424 U.S. 382 (1976) and *Williams v. Lee, supra.*[8]

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[8] One example of insufficient state interests to justify the extend of state jurisdiction was addressed in Cabazon. There california sought to regulate tribal bingo, asserting that the state had an interest in preventing the infiltration of the tribal bingo enterprises by organized crime. The Supreme Court held this to be insufficient to permit the state to have jurisdiction. This decision is important especially in light of the fact that California had expressly been granted certain jurisdictional rights

This Court has once before attempted to exercise jurisdiction where it had not been expressly permitted by the federal government. In *State ex rel. May v. Seneca-Cayuga Tribe,* 711 F.2d 77 (Okla. 1985), we stated that Oklahoma has "residual" civil jurisdiction over Indian country. Relying on a novel interpretation of Pub.L. 83-280, we held that assertion of jurisdiction under Pub.L. 83-280 was not the only way in which a state could exercise general civil jurisdiction. We stated that our state could exercise authority over Indian country under its "residual jurisdiction" powers:

> The concept of 'residuary' jurisdiction is used to invest state courts with jurisdiction interstitially when the subject-matter of cognizance does not infringe upon tribal self-government and has not been preempted by congressional legislation.

Id. at 88. We continued by balancing the interests of the state in regulating tribal bingo against that of the federal and tribal governments, holding that the state is not necessarily precluded from exercising jurisdiction.

Unfortunately, the Tenth Circuit disagreed with our *May* analysis in *Seneca-Cayuga Tribe v. State ex rel. Thompson,* 874 P.2d 709 (10th Cir. 1989). The same issue was presented in a connected case in the federal courts. The Tenth Circuit held that the Oklahoma Supreme Court's ruling in *May* was inconsistent with federal law,

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under Pub. L. 280, yet the Court still declined to extend the state's jurisdiction to cover this situation. Oklahoma, by failing to take action under Pub. L. 280, has even less regulatory authority than does California.

and because it was a matter of interpretation of federal principles, this Court's analysis was not binding. *Id.* at 714. The federal court first looked to whether it should abstain from exercising jurisdiction. Answering that question in the negative, the court pointed out the primacy of the federal interest:

> The Constitution grants to Congress the power 'To regulate Commerce . . . with the Indian Tribes.' U.S. Const. art I, § 8, cl.3. The treaties and other agreements that govern the relationship between the Indians and other Americans are part of 'the supreme law of the Land." Id. art VI, cl.2. *It is Congress that has set the terms under which modern American Indians live, the United States Supreme Court that has shaped the interpretation of those terms and the federal Bureau of Indian Affairs that has managed the day-to-day- interactions with the Tribes. Indeed, Oklahoma, like many other states, was required to disclaim jurisdiction over Indians at statehood.*

Id. at 712. (Emphasis Added). The Tenth Circuit continued by noting that the "presumption and the reality, however, are that federal law, federal policy, and federal authority are paramount in the conduct of Indian affairs in Indian Country." *Id.* at 713. The Tenth Circuit concluded that the federal court – not the Oklahoma state courts – had jurisdiction to regulate the civil matter of tribal bingo.

As for the majority's claim that *Harjo* and *Abhoah* failed to consider "ouster" principles, these two cases have been approved by a federal court. In *Richardson v. Malone,* 762 F.Supp. 1463 (N.D.Okla. 1991), the federal

district court held that it had jurisdiction over a foreclosure action against Indian defendants involving property located in Indian country. The court again pointed out that Oklahoma had not accepted civil jurisdiction as authorized by Pub.L. 83-280. Citing *Harjo* and *Abhoah,* the federal court agreed that the state did not have jurisdiction. *Id.* at 1466. Because of the absence of tribal courts and the lack of jurisdiction in the state court, the contract dispute was properly lodged in the federal courts.

Here, if the transaction or land involved was not Indian country[9] within the definition of 18 U.S.C. 1151, then Oklahoma courts have jurisdiction to decide the matter. It is with this inquiry that *Abhoah v. Housing Authority of the Kiowa Tribe of Indians,* 660 P.2d 625 (Okla. 1983) and *Housing Authority of Seminole Nation v. Harjo,* 790 P.2d 1098 (Okla. 1990) come into play. These two cases dealt with Section 1151's definition of "Indian country." The relevant portion of Section 1151 states that "Indian country" includes "all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory

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[9] It is not "reservation" status that blocks the state from asserting jurisdiction. In *Oklahoma Tax Comm'n v. Sac and Fox Nation,* 113 S.Ct. 1985 (1993), the United States Supreme Court stated that "reservation" status was irrelevant; the proper inquiry was whether the event took place in "Indian country" or involved a tribal member who lived in "Indian country." *Id.* at 1591. The Court went on to note that "Congress has defined Indian country broadly to include formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States." *Id.; see* 18 U.S.C. §1151.

thereof, and whether within or without the limits of a state."

In *Harjo*, an Indian homeowner fell behind in her payments to the Indian housing authority. The authority brought suit in state court for forcible entry and detainer. The homeowner urged that the state did not have jurisdiction over the matter because her home was located in a dependent Indian community. The evidence showed that she inherited restricted Seminole land from her husband. She deeded the land to the housing authority to build her a house. Under a Mutual Help and Occupancy Agreement, the authority built the house. The woman agreed to make payments for seventeen years. After all payments were made, the house and land were to be deeded back to her.

Relying on federal case law[10], we held that the factors to be considered when determining whether land is located in a dependent Indian community were:

> (1) [w]hether the United States had retained title to the lands which it permits the Indians to occupy and authority to enact regulations and protective laws respecting this territory, (2) the nature of the area in questions, the relationship of the inhabitants of the area to Indian tribes and to the federal government and the established practice of government agencies toward the area, (3) whether there is an element of cohesiveness manifested either by economic pursuits in the area, common interests, or needs

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[10] *United States v. South Dakota*, 665 F.2d 837 (8th Cir. 1981), *cert. denied*, 459 U.S. 823 (1982); *United States v. Martine*, 442 F.2d 1022 (10th Cir. 1971).

> of the inhabitants as supplied by that locality, and (4) whether such lands have been set apart for the use, occupancy and protection of dependent Indian peoples.

The federal government has jurisdiction over "those communities which, while neither part of a federal reservation nor Indian 'allotments,' are both 'Indian' in character and federally dependent." *Harjo*, 790 P.2d at 1100-1101, *quoting United States v. Levesque*, 681 F.2d 75, 77 (8th Cir. 1982), *cert. denied*, 459 U.S. 1089 (1982). In general terms, the decisive question is whether the land was "validly set apart for the use of the Indians, as such, under the superintendence of the government." *United States v. Pelican*, 232 U.S. 442 (1914). The ultimate decision as to whether land is situated within a dependent Indian community is factually specific. *Pelican, supra; Alaska v. Native village of Venetie*, 856 F.2d 1384, 1391 (9th Cir. 1988).

We held that under the circumstances presented in *Harjo*, the land was located within a dependent Indian community. The land remained subject to the control of the federal government; there were comprehensive governmental regulations regarding the MHO agreement. The tribe maintained the sewage and health services to the area. The schools received federal funding, through programs designed to help Indian children. An anthropologist testified that the living arrangement was consistent with a distinct traditional pattern of dwelling within Indian families. The house was located near Indian churches where traditional Indian languages were spoken.

The evidence is not nearly so strong in the present case. The land in question was not owned by Indians nor

held in trust for their benefit prior to the purchase by the housing authority. The home is located on unrestricted fee land. There is not intensive control by the federal government through HUD, because the MHO agreement has been completed and the house and land has been deeded to the Lewises. There do not seem to be close tribal ties to the housing addition. There is no evidence that the residents of the house are dependent on the Sac and Fox Tribe for police or fire protection.[11] Importantly, the Lewis's assert that they are not part of an Indian community. Unlike *Harjo,* where four tracts of lands were deeded to build houses for members of the same family, the only connection between the Lewises and the other homeowners is location. The land was not 'set apart for the use of Indians, as such under the superintendence of the government." *Pelican,* 232 U.S. at 449.

I would determine that the facts are not sufficient to show a "dependent Indian community" under *Harjo.* Thus, the land is not Indian country as defined by Section 1151. The state court has jurisdiction to decide the controversy. This rationale is consistent with the decisions of the United States Supreme Court, the federal courts of appeal, and our own jurisprudence.

I am authorized to state that Justice Kauger joins in these views.

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[11] The Authority states that such protection is available.

IN THE DISTRICT COURT OF THE TWENTY-THIRD JUDICIAL DISTRICT SITTING WITHIN AND FOR POTTAWATOMIE COUNTY STATE OF OKLAHOMA

JOANN LEWIS and JAMES F. LEWIS, Husband and Wife, and MARJORIE L. WOLFE,	)	
Plaintiffs,	)	No. C-90-666
vs.	)	(Filed
THE HOUSING AUTHORITY OF THE SAC AND FOX NATION,	)	May 3, 1991)
Defendant.	)	

ORDER

BE IT REMEMBERED that on the 21st day of February 1991 this matter came on for hearing of Defendant's Motion to Dismiss. The Plaintiffs appeared by and through their attorney of record, Douglas Combs. The Defendant appeared by and through its attorney of record, Mildred Harjo Ware. The Plaintiff called two (2) witnesses who were sworn, examined and cross-examined. Defendant asserted that the Courts of the State of Oklahoma lack personal, subject matter and territorial jurisdiction to hear Plaintiffs' claim. In particular, Defendant asserted that the United States Department of Housing and Urban Development is an indispensable party pursuant to 12 O.S. §2019(A) and (B) and therefore the action must be dismissed. Second, the Defendant asserted that Plaintiffs' claims are barred by tribal sovereign immunity in that the Sac and Fox Housing Authority is an agency of the sovereign Sac and Fox Nation; that the

sovereign has not consented to suit against its agency in the state court, depriving the Court of both personal and subject matter jurisdiction. Third, the subject property which Plaintiffs seek is Indian Country and therefore the State Court lacks territorial jurisdiction.

In response, Plaintiffs alleged that HUD is not an indispensable party; that the Defendant, a State agency, may be sued in State court; and the subject minerals are not Indian Country due to the character of the land.

After considering the pleadings, testimony and exhibits admitted at the hearing, the briefs and arguments presented by counsel for the parties, and being fully advised in the premises, the Court enters the following findings of fact and conclusions of law:

1. The United States established Low Rent Public Housing Programs to establish low-income housing through the United States Housing Act of 1937. The Housing Act of 1937 is silent as to the sovereign immunity of the tribe.

2. The United States created a Federal agency, the Department of Housing and Urban Development (HUD), to administer, supervise and control use of Federal funds.

3. HUD promulgated extensive regulations at 24 C.F.R., Part 905.

4. HUD instituted Indian Housing programs in 1962.

5. The Sac and Fox Nation is a Federally recognized sovereign Indian nation.

6. The Sac and Fox Nation established the Sac and Fox Housing Authority in 1966 to provide low-income housing for its citizens and other Indians; the 1966 resolution was silent as to express waiver of sovereign immunity and designation of forum in which to be sued.

7. The parties have entered MHO agreements which Plaintiffs seek to enforce.

8. The Sac and Fox Nation reorganized the Sac and Fox Housing Authority in the Sac and Fox Housing Authority Act of 1983, Public Law SF-83-25, subsequent to the execution of Plaintiffs' contracts and agreements with the Sac and Fox tribe of Oklahoma Housing Authority.

9. The Sac and Fox constitution makes no provision for tribal laws to be approved by the Secretary of the Department of the Interior.

10. Pursuant to 24 C.F.R., Part 905, which requires the approval OR review and comment of tribal ordinances creating housing authorities, the Department of the Interior has reviewed and commented that the Sac and Fox Nation has the authority to reorganize its housing authority.

11. HUD has made no final agency decision concerning its approval of the Sac and Fox Housing Authority Act of 1983; that the issue of approval remains on appeal.

12. The Sac and Fox Nation in P.L. SF-83-25, Ch. 3, §302, provides a waiver of the housing authority's sovereign immunity and designates the tribal court as the forum in which the housing authority is to be sued.

13. The Sac and Fox Housing Authority purchased land in fee simple, re-platted the land and created Sac and Fox Addition No. 2 in its use of Federal funds designated as Project 90-05, the subject of these proceedings.

14. Federal Regulation, 24 C.F.R. 905.422(D)(2) requires the approval of HUD for conveyance of Housing Authority properties.

15. The Sac and Fox Housing Authority tenders payment in lieu of taxes to the Sac and Fox Nation pursuant to tribal law.

16. The Sac and Fox Nation provides police protection, social services and food to the inhabitants of Project 90-05.

17. Indian Health Service provides health care to the inhabitants of Project 90-05.

18. Law enforcement officers in the City of Shawnee and Pottawatomie County treat Project 90-05 as Indian Country, regardless of whether the Housing Authority owns the land.

19. The Sac and Fox Tribal Police provide exclusive police protection in Project 90-05.

20. The evidence is inconclusive as to whether or not the Plaintiff, Marjorie L. Wolfe, who holds title in fee simple, remains a part of the mutual help project or is entitled to Sac and Fox tribal police services.

21. The Court finds that the payment of in lieu taxes as found above, as well as the provision of tribal health, police, social and food services, as found above, did not

exist at the time of the entry into the contracts and agreements of the parties.

22. Project 90-05 has been designated as Indian Country in *State vs. Franklin et al.*, No. CRT-83-3109, CRF-83-3153.

23. The State of Oklahoma does not appoint board members to the Sac and Fox Housing Authority Board of Commissioners, does not provide services to the inhabitants of Project 90-05, and does not appropriate funds for the Sac and Fox Housing Authority.

24. The Plaintiffs, JoAnn Lewis and James F. Lewis, are husband and wife, and executed a contract with the Defendant, Sac and Fox Tribe of Oklahoma Housing Authority, known as a Mutual-Help and Occupancy Agreement, on the 22nd day of December 1974.

25. The Plaintiff, Marjorie L. Wolfe, executed a contract with Defendant, Sac and Fox Tribe of Oklahoma Housing Authority, known as a Mutual-Help and Occupancy Agreement on the 22nd day of December 1974.

26. The Plaintiff, Marjorie L. Wolfe, was conveyed her surface interest in her home from Defendant on the 12th day of January 1988 by Warranty Deed and holds title thereto in fee simple.

27. The Defendant "Authority" acquired title without restriction to the property in question, by Warranty Deed, in September 1974. The property acquired was not trust property or restricted Indian property.

28. The Mutual-Help and Occupancy Agreement executed on December 22, 1974 was executed only by the parties herein, JoAnn Lewis and James F. Lewis, and by

Marjorie L. Wolfe, as well as the Defendant, Sac and Fox Tribe of Oklahoma Housing Authority.

29. The "Authority" was at the time of acquisition of the property in question and at the time of execution of the agreement between the Plaintiff formed and established under the provisions of the Oklahoma Housing Act. See 63 O.S. §1051 et seq. Resolution No. 1 "Relating to the Organization of the Housing Authority of the Sac and Fox Tribe of Indians of Oklahoma," enacted by the tribe forming the "Authority" under the Oklahoma Housing Act, has not been repealed or revoked and remains in effect.

30. The "Authority" has applied for the formation of an "Indian Housing Authority" under the provisions of 24 CFR, Ch. IX, Sections 905.101 et seq. The ordinance authorizing the formation of an "Indian Authority" has not been approved by the Department of Interior pursuant to 24 CFR, CH. IX, Section 905.101 et seq.

31. The Department of Interior by and through Charles Ming, Manager of the Department of Interior Oklahoma City office, determined on February 24, 1987 that the Sac and Fox tribe lacks powers of self-government on non-trust lands which would necessitate TWO housing authorities in order to deliver services to its tribal members. The Department of Interior further determined "that the tribal ordinance creating a separate Housing Authority for trust land be and is hereby denied."

32. The provisions of 63 O.S. §1061 of the Oklahoma Housing Authority Act provide that the agencies formed thereunder have the power to sue and be sued.

33. The "Authority" filed in Case No. C-76-27 in the District Court of Pottawatomie County an application for a decree vacating a portion of the plat known as the Maywood Addition to the City of Shawnee, Oklahoma, in which a decree was granted on February 25, 1976. The "Authority" filed in the records of Pottawatomie County Clerk an owner's certificate and dedication for the Sac and Fox Second Addition, including a plat and covenants.

CONCLUSIONS OF LAW

The Court concludes that at the time of the entry of the parties into the contracts and agreements, the enforcement of which is sought herein, the premises in question were not situated within a dependent Indian committee and were not otherwise Indian Country. The Court concludes that the Motion to Dismiss for lack of personal subject matter and territorial jurisdiction should be and the same is hereby overruled and denied, and the Defendants are granted twenty (20) days to answer.

Done on this 3rd day of May 1991.

/s/ Glenn Dale Carter
GLENN DALE CARTER,
District Judge

IN THE DISTRICT COURT OF THE TWENTY-THIRD JUDICIAL DISTRICT SITTING WITHIN AND FOR POTTAWATOMIE COUNTY, STATE OF OKLAHOMA

JOANN LEWIS and JAMES F. LEWIS, Husband and Wife, MARJORIE L. WOLF, Plaintiffs, vs. THE SAC AND FOX TRIBE OF OKLAHOMA HOUSING AUTHORITY, A/K/A THE HOUSING AUTHORITY OF THE SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA, A/K/A HOUSING AUTHORITY OF THE SAC & FOX NATION, A/K/A SAC AND FOX INDIAN HOUSING AUTHORITY OF OKLAHOMA, Defendant.	C-90-666 (Filed Nov. 4, 1991)

JOURNAL ENTRY

NOW on this 29th day of October, 1991, this matter comes on for trial pursuant to regular setting; plaintiffs appear in person and by their attorney, Douglas L. Combs; the defendant appears by Jack Thorpe and by its attorney, Susan Work. Upon examination of witnesses, arguments of counsel, the Court does therefore find:

As to the jurisdictional issue the Court finds that the definition of a dependent Indian community is not an operative fact to the proceedings at hand. The Court

specifically finds that the objections to the jurisdiction of the District Court of the Twenty-third Judicial District Setting in and for Pottawatomie County, are overruled and the Court assumes subject matter and personal jurisdiction over the plaintiffs and defendant.

The Court does further find that the operative issue in the present case is the definition of the term "grounds" as used in the Mutual Help and Occupancy Agreement. The Court further requests briefs of the parties to be filed within fifteen (15) days of October 29, 1991, specifically addressing the following issues:

First, does the definition of "grounds" include mineral interest and is it a legal synonym for the term real estate or real property or does the term "grounds" have a restricted meaning, restricted to surface only?

Secondly, if the Court finds adverse to the position of the defendant as to the first issue above, at what point do the plaintiffs commence enjoyment of the royalty proceeds?

WITNESS my hand the date and year first above stated.

/s/ Glenn Dale Carter
JUDGE OF THE
DISTRICT COURT

APPROVED:

/s/ Douglas L. Combs
Douglas L. Combs
Attorney for Plaintiffs

/s/ T. Susan Work
Susan Work
Attorney for Defendant

IN THE DISTRICT COURT OF THE TWENTY-THIRD JUDICIAL DISTRICT SITTING WITHIN AND FOR POTTAWATOMIE COUNTY STATE OF OKLAHOMA

JOANN LEWIS AND JAMES F. LEWIS, Husband and Wife, MARJORIE L. WOLF, Plaintiffs, V. THE SAC AND FOX TRIBE OF OKLAHOMA HOUSING AUTHORITY, A/K/A THE HOUSING AUTHORITY OF THE SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA, A/K/A HOUSING AUTHORITY OF THE SAC & FOX NATION, A/K/A SAC AND FOX INDIAN HOUSING AUTHORITY OF OKLAHOMA, Defendant.	)	C-90-666 (Filed Nov. 27, 1991)

ORDER

The above styled and numbered cause came on for non-jury trial pursuant to regular assignment on the 29th day of October, 1991. The Plaintiffs appeared by and through their attorney, Douglas L. Combs and the Defendant appeared by and through their attorney, L. Susan Work. At the conclusion of the trial the Court entered certain findings and adjudications which have heretofore

been memorialized and reserved further judgment pending receipt of additional citations of authority on the following issues:

First, does the definition of "grounds" as included in the mutual-help and occupancy agreement entered into by and between the parties include mineral interests, and is it a legal synonym for the term "real estate" or "real property"? or does the term "grounds" have a meaning restricted to surface only? Second, if the Court finds in favor of the Plaintiff and against the Defendant, at what point would the Plaintiffs commence enjoyment of the royalty proceeds?

With respect to the second issue, the parties subsequently stipulated that should the Plaintiffs prevail on the primary issue of the transfer of surface and mineral interests, that the Plaintiffs' enjoyment of the royalty proceeds would commence on the 23rd day of May, 1991, the same being the date upon which the warranty deed conveying surface ownership to the Plaintiffs from the Defendant was executed.

The Court, having considered the further citations of authority submitted by the parties hereto, finds that the term "grounds" as used in the contract between the parties dominated mutual-help and occupancy agreement contemplates all interest in reality [sic], real estate and real property. The Court notes that the contract provides for conveyance of *all of its interest* and further notes that there is no other language of limitation or reservation.

Accordingly, the Court finds for the Plaintiffs and against the Defendant and the Defendant is ordered to specifically perform under the terms of their agreement

and to convey to the Plaintiffs the proportional share or mineral interest effective as of May 23, 1991. Pursuant to the stipulation of the parties, the Plaintiffs' enjoyment of the royalty proceeds are ordered to commence as of the 23rd day of May, 1991, the said date being the date that the warranty deed conveying the surface to the Plaintiffs from the Defendant was executed.

The Plaintiffs are ordered to prepare the appropriate Journal Entry memorializing the proceedings of the 29th day of October, 1991, circulate and submit the same to the Court for signature as is provided by Rule 2.1 of the Rules of the North Central Administrative District.

Done on the 27th day of November, 1991.

/s/ Glenn Dale Carter
GLENN DALE CARTER
DISTRICT JUDGE

IN THE DISTRICT COURT OF THE TWENTY-THIRD JUDICIAL DISTRICT SITTING WITHIN AND FOR POTTAWATOMIE COUNTY STATE OF OKLAHOMA

JOANN LEWIS and JAMES F. LEWIS, Husband and Wife, MARJORIE L. WOLF, Plaintiffs, vs. THE SAC AND FOX TRIBE OF OKLAHOMA HOUSING AUTHORITY, A/K/A THE HOUSING AUTHORITY OF THE SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA, A/K/A HOUSING AUTHORITY OF THE SAC & FOX NATION, A/K/A SAC AND FOX INDIAN HOUSING AUTHORITY OF OKLAHOMA, Defendant.	)	C-90-666 (Filed Dec. 23, 1991)

JOURNAL ENTRY

NOW on this 29th day of October, 1991, this matter comes on for trial pursuant to regular setting; plaintiff JoAnn Lewis appears in person and by her attorney, Douglas L. Combs; Douglas L. Combs appears on behalf of plaintiff James F. Lewis; the defendant appears by Jack Thorpe and by its attorney, Susan Work. Upon examination of witnesses and arguments of counsel, the Court does therefore find:

The Court having considered further citations of authority submitted by the parties hereto, does therefore find for the plaintiffs, JoAnn Lewis and James F. Lewis, and against the defendant, the Sac and Fox Tribe of Oklahoma Housing Authority, a/k/a the Housing Authority of the Sac and Fox Tribe of Indians of Oklahoma, a/k/a Housing Authority of the Sac and Fox Nation, a/k/a Sac and Fox Indian Housing Authority of Oklahoma, and the defendant herein named is ordered to specifically perform under the terms of the agreement and to convey to the plaintiffs their proportional share of mineral interest effective as of May 23, 1991.

The Court further finds, by reason of the stipulation of parties, that the plaintiffs' enjoyment of the royalty proceeds are ordered to commence as of the 23rd day of May, 1991, the said date being the date the Warranty Deed conveying the surface to the plaintiffs from the defendant was executed.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that plaintiffs, JoAnn Lewis and James F. Lewis, are granted judgment on the second cause of action for an accounting against the defendant, the Sac and Fox Tribe of Oklahoma Housing Authority, a/k/a the Housing Authority of the Sac and Fox Tribe of Indians of Oklahoma, a/k/a Housing Authority of the Sac and Fox Nation, a/k/a Sac and Fox Indian Housing Authority of Oklahoma, in the amount of $151.46 for oil and gas revenues attributable to the plaintiffs' property from May, 1991, through September, 1991; and all accruing royalty sums thereafter earned attributable to the plaintiffs' property.

WITNESS my hand this 27th day of November, 1991.

/s/ Glendale Carter
JUDGE OF THE
DISTRICT COURT

APPROVED:

/s/ Douglas L. Combs
Douglas L. Combs
Attorney for Plaintiffs

/s/ L. Susan Work
Susan Work
Attorney for Defendant

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Wednesday, June 14, 1995
(Filed June 15, 1995)

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

77,639 Floyd Smith and Anna J. Smith v. Dennis Krawetzke and Carolyn Krawetzke.
Certiorari denied.
All Justices concur.

78,825 JoAnn Lewis and James F. Lewis et al. v. The Sac and Fox Tribe of Oklahoma Housing Authority et al.
Rehearing denied.
CONCUR: Wilson, C.J., Hodges, Lavender, Simms, Hargrave, Opala, Watt, JJ.
DISSENT: Kauger, V.C.J., Summers, J.

81,699 Gary Leon Torres, Personal Representative of the Estate of Christopher Wade Torres, Deceased, Gary Leon Torres and Patty S. Torres v. Superior Supply Company, Inc.
Certiorari denied.
CONCUR: Wilson, C.J., Kauger, V.C.J., Hodges, Lavender, Simms, Hargrave, Summers, Watt, JJ.
DISSENT: Opala, J.

82,210 Gena E. Elmore, a minor by and through her next friend James F. Cotton v. Amy Horn Pool.
Certiorari denied.
All Justices concur.

82,403 Roger M. Kilby v. State of Oklahoma, Board of Regents of the University of Oklahoma.
Certiorari denied.
All Justices concur.

82,548 Mid-America Fuel Company, a limited partnership v. Cherokee Acquisitions, Inc. a/k/a Wil-Gro Fertilizer, Inc. a/k/a Willard Grain & Feed, Inc.
Certiorari denied.
CONCUR: Wilson, C.J., Kauger, V.C.J., Hodges, Opala, Summers, Watt, JJ.
DISSENT: Lavender, Simms, Hargrave, JJ.

82,952 Karen Carris d/b/a Sunbelt Construction v. John R. Thomas, P.C. et al.
Rehearing denied.
CONCUR: Kauger, V.C.J., Lavender, Hargrave, Opala, Summers, Watt, JJ.
DISSENT: Wilson, C.J., Hodges, Simms, JJ.

83,092 Dennis Moseby, Dave Witt and Richard Polishuk v. Michael P. Kier, City Clerk, City of Tulsa and Susan Savage, Mayor of the City of Tulsa.
Certiorari denied.
CONCUR: Wilson, C.J., Kauger, V.C.J., Simms, Hargrave, Watt, JJ.
DISSENT: Hodges, Lavender, Opala, Summers, JJ.

83,278 Stephen R. Melton and Theresa A. Melton v. Paula R. Gulledge.
Certiorari denied.
CONCUR: Wilson, C.J., Kauger, V.C.J., Hodges, Lavender, Simms, Hargrave, Summers, Watt, JJ.
DISSENT: Opala, J.

/s/ Alvin Wilson
CHIEF JUSTICE